(25,895)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 1065.

NORTHERN PACIFIC RAILWAY COMPANY AND THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE, PETITIONERS,

vs.

E. W. McCOMAS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 11, 1917.

1-4 In the Circuit Court of the State of Oregon, for Umatilla County.

E. W. McComas, Plaintiff,

vs.

Northern Pacific Railway Company, a Corporation; The Farmers Loan & Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Defendants.

Complaint.

The plaintiff for cause of suit against the above named defendants alleges:

I.

That the Northern Pacific Railway Company is now, and was at all times mentioned in this complaint, a corporation duly incorporated, organized and doing business under the laws of the State of Wisconsin, owning and operating a railroad line and owning lands connected therewith in the State of Oregon.

II.

That the Farmers Loan & Trust Company, Trustee, is and was at all times herein mentioned, a corporation duly incorporated organized, and doing business in the State of New York and State of Oregon, under and by virtue of the laws of the State of New York.

III.

That the plaintiff is now the owner in fee and in possession of the following described lands situated in Umatilla County, State of Oregon, to-wit: Lots One (1), Two (2), and Four (4), in Section Five (5), Township (5), North, Range Thirty (30) East of the Willamette Meridian:

5 & 6 The Northeast Quarter (NE¼), The Northwest Quarter (NW¼), the North Half of the Southwest Quarter (N½ of SW¼); the Northwest Quarter of the Southeast Quarter (NW¼ of SE¼); the Southwest Quarter of the Southwest Quarter (SW¼ of SW¼), and the Southeast Quarter of the Southwest Quarter (SE¼ of SW¼) of Section Seven (7), Township Five (5) North, Range Thirty (30) East of the Willamette Meridian; and the Northwest Quarter (NW¼) of the Northeast Quarter (NE¼) and the Northeast Quarter (NE¼) of the Northwest Quarter (NW¼) of Section Eight (8), Township Five (5), North, Range Thirty (30) E. W. M.; and the said above described lands are not in the possession of any other person or persons.

IV.

That the plaintiff and his grantors have been the owner in fee and in possession of the said lands under a claim of right, title and interest and color of title thereto, for more than ten (10) years prior to the commencement of this suit, adversely to the defendants herein and all the world.

V.

That the defendants and each of them and other persons unknown to the plaintiff, claim to have some right, title or interest in the said lands adverse to the plaintiff.

Wherefore, the plaintiff prays for a decree of this Court quieting his title thereto, and declaring the plaintiff to be the owner in fee of said lands; and that the plaintiff have judgment against the defendants herein for his costs and disbursements in this suit; and for such other and further relief as may be equitable.

SWEEK, FOUTS & SHELTON &
R. J. SLATER,
Attorneys for Plaintiff.

(Verified.)

7 In the Circuit Court of the State of Oregon, for Umatilla County.

E. W. McComas, Plaintiff,

vs.

Northern Pacific Railway Company, a Corporation; The Farmers Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Defendants.

Answer.

Now come the defendants, Northern Pacific Railway Company and The Farmers Loan and Trust Company, and make this their answer to the complaint herein.

These defendants admit the allegations of paragraphs I and II of the complaint with reference to the organization and business of these defendants.

These defendants deny that plaintiff is the owner in fee and in possession of the lands described in the complaint, except that defendants admit that plaintiff is the owner and in possession of the south half of northeast quarter (S½ of NE¼), south half of northwest quarter (S½ of NW¼) and northwest quarter of southwest quarter (NW¼ of SW¼), section seven (7) in township five (5) north of range thirty (30) east of the Willamette Meridian.

These defendants deny that plaintiff and his grantors have been the owners in fee and in possession of the land described in the com-

plaint under a claim of right, title and interest and color of title thereto for ten years prior to the commencement of this suit adversely to these defendants and to all the world.

8 These defendants admit that the defendant Northern Pacific Railway Company claims to be the owner in fee of and the defendant The Farmers Loan and Trust Company claims to have an interest in, all of the lands described in the complaint, excepting said south half of northeast quarter (S½ of NE¼), south half of northwest quarter (S½ of NW¼) and northwest quarter of southwest quarter (NW¼ of SW¼), section seven (7) in township five (5) north of range thirty (30) east of the Willamette Meridian, hereinabove referred to, and excepting lot four (4) in section five (5), the north half of northeast quarter (N½ of NE¼) of section seven (7) and the northwest quarter of northeast quarter (NW¼ of NW¼) and northeast quarter of northwest quarter (NE¼ of NW¼) of section eight (8), all in township five (5) north of range thirty (30) east of the Willamette Meridian.

And the defendants make the following further and separate answer to the complaint herein:

On or about December 31, 1907, the United States conveyed to the defendant, Northern Pacific Railway Company by patent, said lot one (1) of section five (5) in township five (5) north of range thirty (30) east of the Willamette Meridian; on or about May 4, 1909, the United States conveyed to the defendant Northern Pacific Railway Company by patent lot two (2) of said section five (5); on or about November 25, 1907, the United States conveyed to the defendant Northern Pacific Railway Company by patent, north half of northwest quarter (N½ of NW¼)—also known as lots one (1) and two (2) of section seven (7) in said township and range; on or about June 8, 1906, the United States conveyed to the defendant Northern Pacific Railway Company by patent the northeast quarter of southwest quarter (NE¼ of SW¼) of said section seven (7); and on or about May 4, 1909, the United States conveyed to the defendant Northern Pacific Railway Company

9 by patent the northwest quarter of southeast quarter (NW¼ of SE¼), southwest quarter of southwest quarter (SW¼ of SW¼) and southeast quarter of southwest quarter SE¼ of SW¼) of said section seven (7). These defendants allege that by virtue of the title so conveyed by said patents of the United States the defendant Northern Pacific Railway Company is the owner in fee and entitled to the possession of the lands so conveyed by said patents, and the defendant The Farmers Loan and Trust Company has a lien thereon under and by virtue of a mortgage or deed of trust made and executed by the defendant Northern Pacific Railway Company. Each and all of said patents so conveyed the land to the defendant Northern Pacific Railway Company were issued by the proper officers of the United States under an Act of Congress of the United States approved July 2, 1864, entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast by the Northern Route."

For their further and separate answer to the complaint herein, these defendants allege that on and prior to October 11, 1912, said lot four (4) of section five (5) in township five (5) north of range thirty (30) east of the Willamette Meridian was public land of the United States; that on said day the defendant Northern Pacific Railway Company filed in the United States Land Office at La Grande, Oregon, its Mineral Indemnity Selection List by which it made selection in conformity with the laws of the United States of said lot four (4); said selection list was duly approved by the local land office of the United States and since said time has been pending and still is pending in the General Land Office of the United States awaiting approval or rejection by the proper officers of the Land Department of the United States.

These defendants therefore allege that this court is without jurisdiction to try and determine the title to and ownership of said lot four (4).

10 For their further and separate answer to the complaint herein, these defendants allege that on and prior to the 23rd day of July, 1908, said north half of northeast quarter (N½ of NE¼) of section seven (7) in township five (5) north of range thirty (30) east of the Willamette Meridian was public land of the United States; that on said day the defendant Northern Pacific Railway Company filed in the United States Land Office at La Grande, Oregon, its Mineral Indemnity Selection List, by which it made selection in conformity with the laws of the United States of said north half of northeast quarter (N½ of NE¼) of section seven (7); said selection list was duly approved by the local land office of the United States and since said time has been pending and still is pending in the General Land Office of the United States awaiting approval or rejection by the proper officers of the Land Department of the United States.

These defendants therefore allege that this court is without jurisdiction to try and determine the title to and ownership of said north half of northeast quarter (N½ of NE¼) of section seven (7).

For their further and separate answer to the complaint herein, these defendants allege that on and prior to March 19, 1908, said northwest quarter of northeast quarter (NW¼ of NE¼) and northeast quarter of northwest quarter (NE¼ of NW¼) of section eight (8) in township five (5) north of range thirty (30) east of the Willamette Meridian, was public land of the United States; that on that day the United States conveyed the said tracts by patents duly and lawfully issued to the defendant Northern Pacific Railway Company. Thereafter and prior to the commencement of this suit the defendant Northern Pacific Railway Company conveyed the said tracts to Joseph C. Scott and as these defendants are informed and

11 & 12 believe said Joseph C. Scott is still the owner in fee of said tracts. The said Joseph C. Scott, as these defendants are informed and believe, is still living and this suit as to the said northwest quarter of northeast quarter (NW¼ of NE¼) and northeast quarter of northwest quarter (NE¼ of NW¼) of section eight (8)

cannot properly proceed to a determination without the presence as a party thereto, of the said Joseph C. Scott.

Wherefore, these defendants pray that this court adjudge and decree that the defendant Northern Pacific Railway Company is the owner in fee and entitled to the possession of said lots one (1) and two (2) of section five (5), north half of northwest quarter (N½ of NW¼) of section seven (7), northeast quarter of southwest quarter (NE¼ of SW¼) of section seven (7) and northwest quarter of southeast quarter (NW¼ of SE¼), southwest quarter of southwest quarter (SW¼ of SW¼) and southeast quarter of southwest quarter (SE¼ of SW¼) of section seven (7), all in township five (5) north of range thirty (30) east of the Willamette Meridian, and that its title thereto be quieted, save as to the mortgage lien thereon of the defendant The Farmers Loan and Trust Company and that the defendant The Farmers Loan and Trust Company has a lien upon said lands by virtue of a mortgage or deed of trust executed and delivered by the defendant Northern Pacific Railway Company; and that this suit be dismissed as to the said lot four (4) of section five (5), north half of northeast quarter (N½ of NE¼) of section seven (7) and northwest quarter of northeast quarter (NW¼ of NE¼) and northeast quarter of northwest quarter (NE¼ of NW¼) of section eight (8) in township five (5) north of range thirty (30) east of the Willamete Meridian; that these defendants be given judgment for costs and their disbursements, and be given such other and further relief as may be equitable.

CAREY AND KERR AND
C. A. HART,
Attorneys for Defendants Northern Pacific Railway Company and The Farmers Loan and Trust Company.

(Verified.)

13 & 14 In the Circuit Court of the State of Oregon, for Umatilla County.

E. W. McCOMAS, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; THE Farmers Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Defendants.

Reply.

Comes now the plaintiff and for reply to the answer filed herein, admits and denies as follows:

I.

For reply to the first further and separate answer the plaintiff denies each and every allegation therein contained, excepting as alleged in the complaint.

II.

For reply to the second further and separate answer the plaintiff denies each and every allegation therein contained, excepting as alleged in the complaint.

III.

In reply to the third further and separate answer plaintiff denies each and every allegation therein contained, excepting as alleged in the complaint.

Wherefore, the plaintiff prays as in the complaint.

SWEEK, FOUTS & SHELTON AND
R. J. SLATER,
Attorneys for Plaintiff.

(Verified.)

15 In the Circuit Court of the State of Oregon, for Umatilla County.

E. W. McCOMAS, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Opinion.

Passing preliminary statements, there being no disagreement as to facts, and without a detailed discussion of the law or of the numerous cases cited by one side or the other, I will state briefly the conclusion reached after a very careful examination of the authorities cited, and a very careful consideration of the respective briefs.

It is conceded that the lands in controversy passed to the Northern Pacific Railroad Company immediately upon the filing by said company of its map of definite location on June 29, 1883, unless at that time the said lands were not free from "preemption or other claims or rights."

It is the contention of defendant that the Swamp Land Selection List of the State of Oregon was at the time of the filing of the map of definite location a "claim" against the land which would exempt same from the grant to the railway company.

If this contention be upheld then it follows as a matter of course that the lands remained public lands, and title did not pass to plaintiff or his predecessors by adverse possession. Otherwise title did pass.

In the case of Pengra vs. Munz 29 Fed. 830 it is held by Judge Deady in effect that the failure of the proper state officials to file a list of the lands selected under the Swamp Land Act prior to the
16 year 1872 was relinquishment of any right or claim the state might have as against the lands.

This decision is severely criticised by counsel for defendant and it

is strongly urged that it should not be followed. The case of Gaston vs. Stott 5 Or. 48 is cited as holding a contrary doctrine, but the point of importance in that case was as to whether or not the grant was one in præsenti, and the opinion of Justice McArthur was later expressly overruled in the cases of Small vs. Lutz 41 Or. 577, and Morrow vs. Warner Valley Stock Co. 56 Or. 329.

These last mentioned cases having been decided after the Supreme Court of the United States had passed upon the subject in the cases of Michigan L. & L. Co. vs. Rust 168 U. S. 589 and Brown vs. Hitchcock 173 U. S. 473.

However Gaston vs. Stott if authority to be recognized for any purpose, after being overruled as mentioned, holds that the state did not lose its rights because its officers did not act more promptly.

This contention is supported by later authorities as cited by counsel for defendants, and while there is to be found both law and basis for argument on each side of the question, it seems to me that defendant's position as to this question must ultimately prevail whenever the higher courts are called upon to decide.

It is not so clear however that subordinate State Courts should not follow the case of Pengra vs. Munz supra until the question is finally settled by the appellate courts upon the particular question raised here. A Federal question is involved and while indeed the State courts are only bound by the ruling of the Supreme Court of the United States. yet there should be manifest error before the refusal to follow the U. S. District Court upon a Federal question.

But assuming that the state forfeited no *fights* by its failure to act more promptly, there still remains what seems to me to
17 be in its final analysis the real question in the case, and that is,—what was meant by the words, "free from preemption or other claims or rights"? in the Act of July 2, 1864?

It is plaintiff's contention that these words referred only to claims of record or to those recognized officially by some officer of the Government. He cites the case of N. P. R. R. Co. vs. Coleburn 164 U. S. 383. In this case it is held that the claim or right need not necessarily be one of record, but that it must be a bona fide claim, and such as indicates an intention to perfect the claim.

When analyzed there is no inconsistency in the several decisions urged upon the court by both parties to this suit.

But there is to be found in all of the decisions upon the subject an evident purpose to say that it is not every claim that answers the requirements of the law so as to prevent the passing of title under the particular grant then being considered. It is settled beyon*g* controversy that the claim need not be one of record, but it seems to me to be equally well settled that where under a given state of facts a court of Equity should say that a party is guilty of laches in not pursuing a claim or demand, then as a matter of law by non-action the claim though sufficient, at one time, becomes insufficient when it is allowed to become stale. And while it may be assumed that the filing of the Swamp Land List in 1872 constituted a claim sufficient at the time to withhold the selections from passing had the map of definite location been then or within a reasonable time thereafter filed by the

railway company, yet it by no means follows that such would be the legal effect for all future time.

It seems to me that the court should look to the conditions existing in the year 1883, and from all the facts and circumstances say wh-ther at that time there was a "claim" within the contemplation of the law.

18 The question is not easy of solution but it is my opinion that if the State of Oregon ever had a valid claim against this land, there had been no act to indicate at the time of the definite location that the state was still claiming this land under the Swamp Land Act or otherwise. In fact would seem that there had been a complete abandonment of any claims the state theretofore had, and this conclusion is backed up by the subsequent acts of both the State and the United States, when patents passed to the defendant. It would also seem that defendants act in first accepting the patents and then undertaking to re-convey to the Government was done to prepare for this particular case.

Upon the case as a whole, I am of the opinion that even though the States claim was filed within the time limit, and at the time constituted a "claim" within the meaning of the Act of 1864, and within the construction of the word as found in the decisions cited, yet by the same authorities, the claim made by the state in 1872 would not be recognized by the courts as a claim in 1883 sufficient to exclude the lands from the grant to the defendant.

It follows under the evidence that plaintiff and his predecessors obtained title by adverse possession, and finding will be made accordingly.

March 28, 1916.

GILBERT W. PHELPS,
Circuit Judge.

19 In the Circuit Court of the State of Oregon, for Umatilla County.

E. W. McComas, Plaintiff,

vs.

Northern Pacific Railway Company, a Corporation; The Farmers Loan & Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Defendants.

Findings of Fact and Conclusions of Law.

This matter coming on now for consideration by the Court, the plaintiff having heretofore appeared in this cause by Messrs. Raley & Raley, his Attorneys, and the defendant appearing herein by their counsel, Carey & Kerr and C. A. Hart, Esq., and the Court having heretofore taken and heard such testimony as each of the parties hereto had to offer in said cause, and having listened to arguments and duly considered the briefs of both plaintiff and defendants, and

being advised upon the record, the evidence and testimony in said cause, now makes, finds and files the following

Findings of Fact.

I.

That the plaintiff and defendant, through their respective counsel, have filed a stipulation in this cause, in words and figures as follows:

Plaintiff and defendant hereby stipulate that the following statement with reference to the lands described in the complaint may be taken as the facts in this case.

Section 5, Township 5, North of Range 30 East.

Lot One. Plaintiff hereby withdraws the claim made in the complaint as to this lot, and decree may be entered herein confirming defendant's title.

Lot Two. This lot was patented to defendant Railway Company on May 4, 1909, under the terms of the Act of July 2, 1864, (13 Statutes at Large 365). Previously, however, it had been included in a so-called Swamp Land Selection List filed by the State of Oregon under date of November 23, 1872, under the terms of the Swamp Land Act of Congress of 1850, as extended and applied to the State of Oregon by the Act of March 12, 1860. The claim of the State of Oregon thus asserted by the filing of this Swamp Land List has never been adjusted. On August 10, 1892, the State of Oregon conveyed this lot to Mary Switzler, and she thereafter conveyed said lot to plaintiff in this case.

On December 4, 1912, defendant Northern Pacific Railway Company, assuming that this lot was excluded from its grant because of the existence at the time of definite location of the Swamp Land claim of the State of Oregon, and that the lot therefore was patented to the Railway Company in error, reconveyed the said lot to the United States by deed dated December 5, 1912, and said reconveyance was duly recorded in the office of the County Clerk of Umatilla County on January 15, 1915, in Volume 82 of Deeds, pages 34 and 35.

Thereafter and on January 17, 1913, defendant Northern Pacific Railway Company filed in the local Land Office of the United States at La Grande, Oregon, its Mineral Indemnity Selection List No. 107, selecting Lot 2 in lieu of land lost from its grant of July 2, 1864, because of the classification as mineral lands of said lands within the place limits of the grant; and said Northern Pacific Railway Company claims said Lot 2 by virtue of said selection list (Transcript of Testimony and Proceedings) and by virtue of the terms and conditions of the Act of Congress, approved July 2, 1864.

Lot Four. This lot was included in the Swamp Land List filed

by the State of Oregon on November 23, 1872, (as described
21 in the next preceding paragraph) and thereafter, to-wit: on August 10, 1892, was conveyed by the State of Oregon to Mary Switzler and by her to the plaintiff herein. Thereafter the swamp land claim thus asserted by the State of Oregon was rejected by the General Land Office of the United States.

Defendant Northern Pacific Railway Company made claim to this lot by the filing of its Mineral Indemnity Selection List No. 101, serial number 011236, which selection list was approved by the local land office of the United States on October 11, 1912; and defendant Railway Company now asserts claim to said lot by virtue of said selection list and under the terms of the Act of Congress, approved July 2, 1864.

Section 7, Township 5, North of Range 30 East.

The South Half of Northeast Quarter. The defendants in their answer disclaim any interest in this property and now repeat said disclaimer, and the title of the plaintiff in said tract may be confirmed by decree.

The North Half of Northeast Quarter. This tract was included in the Swamp Land List filed by the State of Oregon on November 23, 1872, (Under Swamp Land Act of Congress of 1850 and 1860 above referred to). The claim of the State thus asserted was therefore rejected by the General Land Office of the United States. On August 10, 1892, the State of Oregon conveyed the tract to Mary Switzler and John Switzler and by mesne conveyances said tract was later conveyed to the plaintiff herein.

Defendant Railway Company made claim to this tract by filing its Mineral Indemnity Selection List No. 67, serial number 0540, specifying, among other lands, this property, which selection list was approved by the local land office of the United States on July 23, 1908; and the defendant Railway Company makes claim to
22 this tract by virtue of the filing of said selection list and under the terms of the Act of Congress, approved July 2, 1864.

South Half of Northwest Quarter. Defendants in their answer disclaim any interest in this tract and now repeat their disclaimer and agree that plaintiff's title thereto may be confirmed by decree.

Lots One and Two (or Fractional North Half of Northwest Quarter). This tract was included in the Swamp Land List filed by the State of Oregon on November 23, 1872 (under the Swamp Land Act of Congress hereinbefore referred to), not yet adjusted. The tract was conveyed by the State of Oregon to John Switzler on August 10, 1892, and by him through mesne conveyances to plaintiff.

This tract was patented to defendant Railway Company on December 31, 1907. The Railway Company assuming that said tract was excluded from its grant because of the existence at the time of definite location of the swamp land claim of the State of Oregon, and assuming that the patent to the Railway Company was erroneous, reconveyed said tract to the United States under date of December 4,

1912, said conveyance being thereafter duly recorded in the office of the County Clerk of Umatilla County in Volume 82 of Deeds at pages 34 and 35.

Thereafter defendant Railway Company made claim to this tract by filing in the local Land Office of the United States at La Grande, Oregon, its Mineral Indemnity Selection List No. 107, dated January 17, 1913, which list specified, among other tracts, this property; and the Railway Company now asserts claim to this tract by virtue of said selection list and under the terms of the Act of Congress, approved July 2, 1864.

Northwest Quarter of Southwest Quarter. Defendants in their answer disclaim any interest in this tract and now repeat said disclaimer and agree that plaintiff's title may be confirmed by decree.

23 Northeast Quarter of Southwest Quarter: This tract was included in the Swamp Land List filed by the State of Oregon on November 23, 1872 (under the Swamp Land Acts of Congress herein-above referred to). The claim of the State of Oregon thus asserted was therefore rejected by the General Land Office of the United States. Prior to such rejection, to-wit: March 15, 1895, the State of Oregon conveyed said tract to Delia Switzler and through mesne conveyances the tract was thereafter conveyed to plaintiff herein.

This tract was originally patented to the defendant Railway Company on June 8, 1906, under the terms of the Granting Act of July 2, 1864, (13 Statutes at Large 365). Defendant Railway Company assuming that said tract was excluded from its grant because of the existence of the swamp land claim of the State of Oregon at the time of definite location, reconveyed said tract to the United States on December 4, 1912, said reconveyance being duly recorded in the office of the County Recorder of Umatilla County in Book 82 of Deeds at pages 34 and 35.

Thereafter defendant Railway Company filed in the Land Office of the United States at La Grande, Oregon, its Mineral Indemnity Selection List No. 106, which list specified this tract, and said selection list was on January 17, 1913, duly approved. Based upon the selection so made by the Railway Company, the tract was on May 25, 1914, patented to the defendant Railway Company, said patent being duly recorded in the office of the County Recorder of Umatilla County in Book 89 of Deeds at page 99. The Railway Company now asserts claim to said lot by virtue of said patent and by virtue of the rights given it by Act of Congress, approved July 2, 1864.

24 Northwest Quarter of Southeast Quarter;
Southwest Quarter of Southwest Quarter;
Southeast Quarter of Southwest Quarter: This land was patented to the defendant Railway Company on May 4, 1909. Plaintiff withdraws the claim made to it in the complaint herein and agrees that defendants' title thereto may be confirmed.

Section 8, Township 5 North of Range 30 East.

Northwest Quarter of Northeast Quarter;

Northeast Quarter of Northwest Quarter: The plaintiff now withdraws the claim made in the complaint as to this land and agrees that defendant's title thereto may be confirmed by decree.

All of the lands in controversy in this suit are within the forty mile place limits of the branch line of the Northern Pacific Railway Company constructed from Ainsworth to Yakima City. The line of definite location for said branch line of Northern Pacific Railway Company from Ainsworth to Yakima City was duly filed in the General Land Office of the United States under the terms of the Granting Act of July 2, 1864 (13 Statutes at Large 365) on the 29th day of June, 1883; that no action has been taken by any officer of the United States upon said Swamp Land List prior to June 29, 1883.

JOHN B. SWITZLER, being called and sworn as a witness on the part of plaintiff testified as follows:

Direct examination by Mr. Raley:

Q. How old are you?

A. I will be seventy-six in May.

Q. How long have you lived in Umatilla County?

A. I don't remember just when I did come to Umatilla County. I came right on that island though, when I did come.

Q. Did you ever get a deed from the State of Oregon to what is known as Switzler's Island, or parts of it?

A. Yes, sir; I got a deed from the State.

Q. Where were you living at the time you got that deed?

A. I was living on the island at the time.

Q. Who was living there with you?

A. My family was with me of course.

Q. How long had you been living there prior to the time you got the deed from the State?

A. Several years, but I don't really remember about how long I did live there; I know it was several years before I got the deed from the State.

Q. Did the deed run directly from the State to you for all of it?

A. Yes, sir; all of it.

Q. Did anybody else b-y any land on the island besides what you bought?

A. No, sir; none that I know of.

Q. Who is Mary Switzler?

A. My wife.

Q. Did she buy some land there?

A. Yes, sir; but that is pretty near the same thing, isn't it?

Q. No, sir; not in law; Now, who is Delia Switzler?

A. My daughter.

Q. Did she buy some land from the State at that time?

A. Yes, sir; all the same time.

Q. After these deeds ran from the State to you and your wife, how long did you live upon Switzler's Island, until you sold it?

A. I lived upon it up to the time I sold it to Mr. McComas you may have some record of it.

Q. Then continuously from the time you got deeds from the State, you and your wife and daughter, up to the time you conveyed to McComas, you and your family lived on the land included in those deeds, did you?

26 A. Yes, sir; all the time. The island was never left one day alone, but I didn't have to live there, but it never was left alone, I always had cattle and stuff to take care of, but while my wife was off to Walla Walla sending the youngsters to school, but we lived there.

Q. Did you and those members of your family who received deeds to that land on the island reside there continuously?

A. Yes, sir.

Q. Now, what improvements were placed on the lands included in those deeds by you and your family during the time you lived on it and prior to the time you sold it to McComas?

A. I had built a house, a barn and a warehouse and wells and put out an orchard.

Q. How many acres of orchard did you put out?

A. There was about thirty acres in prunes and about ten acres—I think it was all cherries and pairs, and then I had a little orchard outside of that, two or—acres right near the house, a much older orchard.

Q. About what was the value of the improvements; how much money did you expend for instance in buildings on that property while you lived there?

A. It is pretty hard for me to get at that in so many years but I would say ten thousand dollars any way, in wells, and pumping plants and orchards and such things as that, and fences.

Q. Describe your dwelling house on the land?

A. The dwelling house was about six or seven room house two stories, and then the barn was quite a big barn, fifty or sixty feet long I think, and then there are out-houses, quite a lot of out-houses.

Q. At the time you lived on and held these lands under the title you received from the State, did you believe that you was

27 the sole and only owner of all of the property included in these deeds?

A. I surely did I had a deed from the State, and I supposed that was all right.

Q. You were holding it and occupying it adversely to all the world in the honest belief that you were the sole and only owner of it?

A. I surely was.

Q. You did that up to the time you conveyed to McComas?

A. Yes, sir; And I could have as well—and Mr. McComas, when he bought it, he thought the title was all right, but he thought he might as well have a warranty deed from me.

Q. Do you know who has been occupying the land since you sold to Mr. McComas?

A. He has had different men, but I can't tell who has been on it since I sold it.

Q. What improvements do you know of being made on the land?

A. There has never been a great deal of improvements since McComas had it; he put in about forty acres of alfalfa or fifty acres, and has a pumping plant, an engine one year I know, and he had in fourteen or fifteen acres of potatoes I know.

Q. Prior to the time you sold to Mr. McComas state whether or not you had any knowledge that any one was claiming any part of the lands included in these deeds adversely to you?

A. I had no knowledge of it if they had.

Q. You had no knowledge that the Railway Company had any claim on it?

A. No, sir; not in the least.

28 Cross-examination by Mr. Hart:

Q. Do you know, Mr. Switzler, can you give me the location again, you told where your house was located?

A. I really don't know exactly, it was on I think Section 7, and over on the Columbia River. It seems to me it was somewhere in about here. (Indicating on plat.)

Q. That is the North half of the Northeast Quarter of Section 7?

A. I kind of think that is it, but I don't know the exact location because I never had that surveyed, because I supposed I owned it all and it didn't make any difference.

Q. Was the whole island improved?

A. No, there was a portion of it I used for pasture, and I don't know whether he has plowed that up yet or not; all the lower end of the island we most always used for pasture, and this end of the island was used mostly for pasture.

Q. Were there fences?

A. Yes, sir; there was a fence across, the Columbia fenced it on one side, and the slough fenced it on the other and then of course all the garden pieces has to be fenced separate you know.

Q. Your garden was around the house?

A. Yes, sir; and then the orchard had to be fenced off separate too.

Q. And that orchard was near the house?

A. Yes, sir; right opposite the house.

Q. How about the upper end?

A. The upper end was all put in alfalfa and potatoes. McComas had quite a lot of potatoes in there one year, I don't know how many, but he had quite a patch of potatoes in there and pumped water for it.

29 Q. About how long since you sold to McComas?

A. About eight or ten years since I sold to McComas.

Q. How close to the river was your house?

A. I suppose it was in low water, it was possibly one hundred

yards in the low water season to the river, but in high water it was right up in the house.

Q. That house was built how many years ago?

A. Some years after I went there we built a new house and tore the old one down.

Q. Do you remember whether that was the house and barn located on section six?

A. No, I think it was in section seven, but I am not sure about that.

Q. It may have been on either section six or seven?

A. Yes, sir, I think so, but I am not right sure about that.

Redirect examination:

Q. Do know whether or not the deeds to you and your wife and daughter included all the land on the Switzler Island?

A. Yes, all of it; no, there was a little piece down at the lower end of the island that the deeds didn't cover, come to think of it, and McComas bought that afterwards.

In the Circuit Court of the State of Oregon, for Umatilla County.

E. W. McCOMAS, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, et al., Defendants.

Stipulation.

The parties hereto stipulate that the foregoing is a true and correct record of the testimony and proceedings taken and had in the foregoing action on the 7th day of December, 1915.

(Sd.) RALEY & RALEY,
Attorneys for Plaintiff.
CAREY & KERR &
CHARLES A. HART,
Attorneys for Defendants.

And based upon said stipulation and agreement, and the record, evidence and testimony in this case, the Court further finds as follows:

II.

That plaintiff withdraws his claim made in the complaint as to Lot 1 of Section 5, Township 5 North, of Range 30 East.

III.

Plaintiff withdraws his claim to the Northwest Quarter of the Southeast Quarter, and the Southwest Quarter of the Southwest

Quarter, and the Southeast Quarter of the Southwest Quarter of Section 7, Township 5 North, of Range 30 East.

31

IV.

The plaintiff withdraws his claim to the Northwest Quarter of the Northeast Quarter, and the Northeast Quarter of the Northwest Quarter of Section 8, Township 5, North of Range 30 East.

V.

That the defendants disclaim any interest in and to the South Half of the Northeast Quarter, and the South Half of the Northwest Quarter, and the Northwest Quarter of the Southwest Quarter of Section 7, Township 5 North, Range 30 East W. M.

VI.

That the lands remaining in controversy and involved in this suit are Lots 2 and 4 of Section 5, and the North half of the Northeast Quarter, and Lots 1 and 2, and the Northeast Quarter of the Southwest Quarter of Section 7, Township 5 North, of Range 30 East W. M.

VII.

That the State of Oregon filed a Swamp Land Selection List under date of November 23, 1872, for the lands in controversy under the terms of the Swamp Land Act of Congress of 1850, as extended and applied to the State of Oregon by the Act of March 12, 1860, and that no action had been taken by any officer of the United States upon said Swamp Land List prior to June 29, 1883.

VIII.

That with the exception of the filing of the Swamp Land List on November 23, 1872, neither the State of Oregon nor any one else has taken any further steps at any time to perfect the title to said list or to secure patent to the State of Oregon for said lands, or any part thereof.

32

IX.

That the lands in controversy are all within the forty mile place limits of the branch line of the Northern Pacific Railway Company, constructed from Ainsworth to Yakima City.

X.

That the line of definite location for said branch line of the Northern Pacific Railway Company from Ainsworth to Yakima City was duly filed in the General Land Office of the United States

under the terms of the Granting Act of July 2d, 1864, on the 29th day of June, 1883.

XI.

That the plaintiff and his grantors and predecessors in interest have been in the actual possession of the lands in controversy, and each and every part thereof, under a claim of right, title and interest and under color of title thereto by deeds from the State of Oregon bearing dates respectively of August 10, 1892, and of March 15, 1895, claiming and holding the same adversely to the defendants and to all the world for long prior to and ever since the 15th day of March, 1895, and are now so in possession and so holding and claiming the lands in controversy, and each and every part thereof, by color of title as aforesaid.

XII.

That while so holding and claiming said lands under color of title as aforesaid, the grantors of the plaintiff expended a large sum of money, to-wit: approximately the sum of $10,000 upon said lands in the erection of buildings, planting out of orchards, building fences and general farm improvements, and the plaintiff is now the owner and holder of such color or title and improvements by and through mesne conveyances thereto.

XIII.

That no patent or other conveyance was ever issued by the
33 United States to the State of Oregon for any of the lands in controversy.

XIV.

That on the 31st day of December, 1907, the United States issued its patent to the defendant for Lots 1 and 2 of Section 7, under the General Granting Act of 1864, for place lands, and on the 9th day of June, 1906, the United States issued its patent to the Northeast Quarter of the Southwest Quarter of said Section 7 as place lands under the General Granting Act of 1864, and on May 4, 1909, the United States issued to the defendant its patent for Lot 2 as place lands, under the General Granting Act of 1864, and that the defendant received and accepted such patents from the United States so conveying said lands as lands in the place limits under said grant.

XV.

And the Court further finds that the defendant, the Northern Pacific Railway Company, is now and was at all the times mentioned in the complaint, a corporation duly incorporated, organized and doing business under the laws of the State of Wisconsin, owing

and operating a railway line and owning lands connected therewith in the State of Oregon.

XVI.

That the Farmers Loan and Trust Company, Trustee, is and was at all the times herein mentioned a corporation, duly incorporated, organized and doing business in the State of New York and State of Oregon, under and by virtue of the laws of the State of New York.

XVII.

That the lands in controversy, as hereinbefore described, are not now and never have been in the possession of any person or persons excepting the plaintiff and his grantors by mesne conveyances.

34

XVIII.

The Court further finds that Lot 4 of Section 5, in Township 5, North, of Range 30 East W. M. was not public lands of the United States on the 11th day of October, 1921, and that such lot never has been public lands of the United States since the 29th day of June, 1883.

XIX.

That the North Half of the Northeast Quarter of Section 7, in Township 5, North, Range 30 East W. M., was not public lands of the United States on the 23d day of July, 1908, and never have been such public lands since the 29th day of June, 1883.

XX.

That on the 4th day of December, 1912, the defendant attempted to reconvey the lands in controversy to the United States, and to that end did make, execute and deliver a quit-claim deed therefor, and the court further finds that such quit-claim deed was without force or effect to restore the said lands so deeded, or any part thereof, to the public domain of the United States.

XXI.

That the equities are all with the plaintiff and against the defendant.

Dated this 7th day of April, 1916.

GILBERT W. PHELPS,
Circuit Judge.

And based upon the foregoing Findings of Fact, the Court makes, finds and files the following

Conclusions of Law.

That the defendant has good and valid claim to Lot 1 of Section 5, and the Northwest Quarter of the Southeast Quarter, and the Southwest Quarter of the Southwest Quarter, and the Southeast Quarter of the Southwest Quarter of Section 7 and the Northwest Quarter of the Northeast Quarter, and the Northeast Quarter
35 of the Northwest Quarter of Section 8, all in Township 5 North, Range 30 East of the Willamette Meridian and the plaintiff has no claim or interest or estate in or to any part of said property.

II.

That the plaintiff is the owner of the South Half of the Northeast Quarter, and the South half of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of Section 7, in Township 5, North, Range 30 East of the Willamette Meridian, and that the defendant has no interest or claim or estate in and to the said lands or any part thereof.

III.

That Lots 2 and 4 of Section 5, and the North Half of the Northeast Quarter, and Lots 1 and 2, and the Northeast Quarter of the Southwest Quarter of Section 7, Township 5, North, of Range 30 East W. M., are odd numbered sections within the forty mile place *mi*nits of the branch line of the Northern Pacific Railway Company. constructed from Ainsworth to Yakima City, by reason of the terms of the Granting Act of July 2, 1864, and that ever since the 29th day of June, 1883, the legal title to said property, and each and every part of it, has been in the Northern Pacific Railway Company.

IV.

That the plaintiff and his gra*b*tors and predecessors in interest have acquired title to the said lots 2 and 4 of section 5, and the North Half of the Northeast Quarter, and Lots 1 and 2, and the Northeast Quarter of the Southwest Quarter of section 7, in Township 5 North, of Range 30 East W. M., by adverse possession and occupancy under color of title, and the plaintiff is now the sole and only owner of said lands, and of each and every part thereof.

36 V.

That neither the defendants nor any of them, nor any person claiming by, through or under them or any of them now have or are entitled to have or claim any interest in said tracts of land, or any part thereof.

VI.

That the deed from the defendants to the United States was without effect to restore the said lands so deeded, or any part thereof, to the public domain of the United States.

VII.

That the defendants acquired no interest or estate in said lands, or any part thereof, by reason of any filings, claims or patents acquired from the United States thereto subsequent to said deed.

VIII.

That the plaintiff is entitled to decree quieting his title to the lands in controversy.

Dated this 7th day of April, 1916.

GILBERT W. PHELPS,
Circuit Judge.

Filed Apr. 7, 1916.
FRANK SALING, *Clerk.*
By MURIEL SALING, *Deputy.*

37 In the Circuit Court of the State of Oregon, for Umatilla County.

E. W. McCOMAS, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; THE Farmers Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Defendants.

Objections of Defendants to Plaintiff's Proposed Findings of Fact and Conclusions of Law.

Now come the defendants and make the following objections to plaintiff's proposed findings of fact and conclusions of law:

Defendants object to findings of fact numbered VIII for the reason that there is no evidence in the record to sustain any such finding. The record does not show what, if any, steps were taken by the State of Oregon after filing of its list on November 23, 1872, in the effort to perfect title to the lands described in said list, but some of the lands included in said list and included in this complaint as to which defendants have disclaimed were in fact subsequently patented to the State of Oregon as a result of their being so listed.

Defendants object to findings numbered XVIII and XIX upon the ground that the evidence herein does not warrant a finding that the lands therein described were not the public lands of the United

States on October 11, 1912, and were not such public lands since June 29, 1883.

38 & 39 Defendants object to finding numbered XX upon the ground that the record herein does not warrant a finding to the effect that the quitclaims executed by defendant, Northern Pacific Company, to the United States were without force or effect to restore the lands deeded to the public domain of the United States.

Defendants object to porposed conclusions of law numbered III, IV, V, VI, VII, and VIII upon the ground that the evidence herein and the facts proven thereby do not justify the conclusions of law so proposed.

Defendants further object to said conclusions of law upon the ground that under and by virtue of the provisions of the Act of Congress of July 2, 1864, said lands in controversy, to-wit:

Lots 2 and 4 of section 5; north half of northeast quarter, lots 1 and 2 and northeast quarter of southwest quarter of section 7, all in township 5 north of range 30 east of Willamette Meridian.

were not on June 29, 1883, when map of definite location of the railway of the defendant, Northern Pacific Railway Company, from Ainsworth to Yakima City was filed, public lands free from any claim within the meaning of said Act, and therefore did not pass to or become the property of defendant, Northern Pacific Railway Company, at the time and because of the filing of said map of definite location on June 29, 1883; and therefore that plaintiff and his predecessors have not acquired any rights to said lands by virtue of possession.

Dated this 6th day of April, 1916.

CAREY & KERR, &
C. A. HART,
Attorneys for Defendants.

40 Be it remembered, That at a regular term of the Circuit Court of the State of Oregon for the county of Umatilla, begun and held in the County Court House in Pendleton, in said County and State, on Monday the 10th day of January, A. D. 1916, the same being the second Monday in said month, and the time fixed by law for holding a regular term of said court.

Present: Gilbert W. Phelps, Judge Presiding.

Whereupon, a term of said Court is begun and holden on Friday, the 7th day of April A. D. 1916, the same being the Fifty-fifth judicial day of said Court; and, among other proceedings, the following were had, to-wit:

E. W. McComas, Plaintiff,

vs.

Northern Pacific Railway Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Defendants.

Decree.

This cause having been heretofore tried in open Court, the plaintiff appearing by Raley & Raley, his attorneys, and the defendants appearing by Carey & Kerr and C. A. Hart, their Attorneys; and the Court having listened to the arguments and considered the evidence in said cause, and being fully advised and having heretofore made and signed and caused to be filed herein its Findings of Fact and Conclusions of law, and being now advised in the premises and advised as to what decree the Court ought to render in said cause,

It is now considered, ordered adjudged and decreed that the defendant the Northern Pacific Railway Company has valid claim to Lot 1 of Section 5, and the Northwest Quarter of the Southeast Quarter and the Southwest Quarter of the Southwest Quarter,
41 and the Southeast Quarter of the Southwest Quarter of Section 7, and the Northwest Quarter of the Northeast Quarter, and the Northeast Quarter of the Northwest Quarter of Section 8, all in Township 5 North, of Range 30 East of the Willamette Meridian, and that the plaintiff has no claim or interest or estate in or to any part of said last above described property.

And it is further considered, ordered, adjudged and decreed that the plaintiff is the owner of the South Half of the Northeast Quarter, and the South Half of the Northwest quarter, and the Northwest Quarter of the Southwest Quarter of Section 7, in Township 5 North, of Range 30 East of the Willamette Meridian, and that the defendant has no interest or claim or estate in or to the said lands or any part thereof.

And it is further considered, ordered, adjudged and decreed, that the plaintiff, E. W. McComas, is the owner of and is in possession of and entitled to the possession of Lots 2 and 4 of Section 5, and the North Half of the Northeast Quarter, and Lots 1 and 2 and the Northeast Quarter of the Southwest Quarter of Section 7, in Township 5 North, of Range 30 East of the Willamette Meridian, and that neither the defendants nor any of them, nor any person claiming by, through or under them or any of them, now have or are entitled to have or claim any interest or estate in said tracts of land, or any part thereof.

And it is further considered, ordered, adjudged and decreed that the title of plaintiff E. W. McComas in and to Lots 2 and 4 of Section 5, and the North Half of the Northeast Quarter, and Lots 1 and 2, and the Northeast Quarter of the Southwest Quarter of Section 7, in Township 5 North, of Range 30 East of the Willamette Meridian, be and the same hereby is forever decreed to be quieted and freed from all claims of every kind and character in any manner asserted

or claimed to be asserted by the defendants or either or any of them.

42 And it is further considered, ordered, adjudged and decreed that plaintiff have and recover of and from the defendant the Northern Pacific Railway Company his costs and disbursements in this suit, taxed at $38.65 and that execution issue to enforce this decree.

Dated this 7th day of April, 1916.

GILBERT W. PHELPS,
Circuit Judge.

43 & 44 In the Circuit Court of the State of Oregon, for Umatilla County.

E. W. McComas, Plaintiff,

vs.

Northern Pacific Railway Company, a Corporation, and The Farmers Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Defendants.

Notice of Appeal.

To E. W. McComas and to Messrs. Raley & Raley, his Attorneys:

You and each of you are hereby notified that the defendants Northern Pacific Railway Company, a corporation, and The Farmers Loan and Trust Company, a corporation, Trustee, and each of them, hereby appeal to the Supreme Court of the State of Oregon from each and every part and the whole of that certain decree rendered and entered against the defendants in the above entitled suit in the Circuit Court of the State of Oregon for Umatilla County on the 7th day of April, 1916, which decree quiets and frees from all claims of every kind and character the title of plaintiff in and to certain of the lands described in this suit, and further adjudges that plaintiff recover of defendant Northern Pacific Railway Company costs and disbursements taxed herein in the sum of thirty-eight and sixty-five hundredths dollars ($38.65).

CAREY & KERR &
C. A. HART,
Attorneys for Defendants Northern Pacific Railway Company and The Farmers Loan and Trust Company, Trustee.

45 In the Circuit Court of the State of Oregon, for Umatilla County.

E. W. McComas, Plaintiff,

vs.

Northern Pacific Railway Company, a Corporation, and The Farmers Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Defendants.

Undertaking on Appeal.

Whereas the defendants, Northern Pacific Railway Company, a corporation, and The Farmers Loan and Trust Company, a corporation, Trustee, have appealed to the Supreme Court of the State of Oregon from a decree made and entered against them in the above entitled cause in said Circuit Court in favor of plaintiff therein and against the defendants on the 7th day of April, 1916, which decree quieted and freed from all claims of every kind and character the title of plaintiff to certain of the lands described in the complaint herein and adjudged that plaintiff recover of the defendant Northern Pacific Railway Company costs and disbursements taxed herein in the sum of thirty-eight and sixty-five hundred*th* dollars ($38.65);

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, Northern Pacific Railway Company, a corporation, and The Farmers Loan and Trust Company, a corporation, Trustee, as principals, and National Surety Company, a corporation organized and existing under the laws of the State of New York, having an office in Portland, Oregon, and being duly author-
46 ized to transact business within the State of Oregon, as surety, do hereby jointly and severally undertake and promise on the part of said defendants and appellants that said defendants and appellants will pay to the plaintiff all damages, costs, and disbursements which may be awarded against them on the appeal.

NORTHERN PACIFIC RAILWAY COMPANY AND
THE FARMERS LOAN AND TRUST COMPANY, Trustee,
By CAREY & KERR &
C. A. HART,
Their Attorneys.
NATIONAL SURETY COMPANY,
By MARC HUBBERT,
Resident Vice President.

[SEAL.]

Attest:

M. H. CROWE,
Resident Ass't Sec'y.

Countersigned at Portland, Ore., April 25th, 1916.
NATIONAL SURETY COMPANY,
By MARC RUBBERT,
Resident Agent.

47 STATE OF OREGON,
County of Umatilla, ss:

I, Frank Saling, County Clerk of Umatilla County, State of Oregon, and ex-officio Clerk of the Circuit Court of said County and State do hereby certify that the foregoing copies of Complaint, Answer, Reply, Opinion, Findings of Fact and Conclusions of Law, Decree, Notice of Appeal and Undertaking on Appeal in the case of E. W. McComas, Plaintiff vs. Northern Pacific Railway Company, a Corporation, The Farmers Loan and Trust Company, a Corporation, Trustee, and other persons unknown to plaintiff, Defendants, have been by me compared with the originals and that they are true and correct transcripts therefrom, and of the whole of each original, as the same appears of record and on file at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, this 3d day of May, A. D. 1916.

[Seal of the Circuit Court, Umatilla Co.]

FRANK SALING, *Clerk,*
By MURIEL SALING, *Deputy.*

48 In the Supreme Court of the State of Oregon, May Term, 1916.

E. W. McCOMAS, Respondent,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; THE FARMERS' Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Appellants.

Appeal from the Decree of the Circuit Court for Umatilla County.

Hon. Gilbert W. Phelps, Judge.

Appellants' Abstract of Record.

Raley and Raley, Attorneys for Respondent.
Carey and Kerr, and Charles A. Hart, Attorneys for Appellants.
Filed May 25, 1916, J. C. Moreland, Clerk, by Lee Moorhouse, Deputy.

48½ STATE OF OREGON,
County of Umatilla, ss:

Due service of the within abstract of record is hereby accepted in Umatilla County Oregon, this 25 day of May, 1916, by receiving a copy thereof duly certified to as such by Charles A. Hart of attorneys for appellant.

J. H. RALEY,
Attorney for Respondent.

49 In the Supreme Court of the State of Oregon, May Term, 1916.

E. W. McComas, Respondent,

vs.

Northern Pacific Railway Company, a Corporation; The Farmers' Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Appellants.

Appeal from the Decree of the Circuit Court for Umatilla County.

Hon. Gilbert W. Phelps, Judge.

Appellants' Abstract of Record.

This action was begun by the filing by plaintiff in the Circuit Court for Umatilla County on the 25th day of September, 1912, of the following Complaint:

Complaint.

The plaintiff for cause of suit against the above-named defendants alleges:

50 I.

That the Northern Pacific Railway Company is now, and was at all times mentioned in this complaint, a corporation duly incorporated, organized and doing business under the laws of the State of Wisconsin, owning and operating a railroad line and owning lands connected therewith in the State of Oregon.

II.

That the Farmers' Loan & Trust Company, Trustee, is and was at all times herein mentioned, a corporation duly incorporated, organized and doing business in the State of New York and State of Oregon, under and by virtue of the laws of the State of New York.

III.

That the plaintiff is now the owner in fee and in possession of the following described lands situated in Umatilla County, State of Oregon, to-wit: Lots one (1), two (2) and four (4), in section five (5), township five (5) north, range thirty (30) east of the Willamette Meridian; the northeast quarter (NE¼), the northwest quarter (NW¼), the north half of the southwest quarter (N½ SW¼); the northwest quarter of the southeast quarter (NW¼ SE¼); the southwest quarter of the southwest quarter (SW¼ SW¼), and the southeast quarter of the southwest quarter (SE¼ SW¼) of section seven

(7), township five (5) north, range thirty (30) east of the
51 Willamette Meridian; and the northwest quarter of the northeast quarter (NW¼ NE¼), and the northeast quarter (NE¼) of the northwest quarter (NW¼) of section 8, township five (5) north, range thirty (30) east, Willamette Meridian; and the said above described lands are not in the possession of any other person or persons.

IV.

That the plaintiff and his grantors have been the owner in fee and in possession of the said lands under a claim of right, title and interest and color or title thereto for more than ten (10) years prior to the commencement of this suit, adversely to the defendants herein and all the world.

V.

That the defendants and each of them and other persons unknown to the plaintiff claim to have some right, title or interest in the said lands adverse to the plaintiff.

Wherefore, the plaintiff prays for a decree of this court quieting his title thereto, and declaring the plaintiff to be the owner in fee of said lands; and that the plaintiff have judgment against the defendants herein for his costs and disbursements in this suit; and for such other and further relief as may be equitable.

On the 30th day of November, 1912, the defendants served and filed the following answer:

52 *Answer.*

Now comes the defendants, Northern Pacific Railway Company and The Farmers' Loan and Trust Company, and make this their answer to the complaint herein.

These defendants admit the allegations of paragraphs I and II of the complaint with reference to the organization and business of these defendants.

These defendants deny that plaintiff is the owner in fee and in possession of the lands described in the complaint, except that defendants admit that plaintiff is the owner and in possession of the south half of northeast quarter (S½ of NE¼), south half of northwest quarter (S½ of NW¼) and northwest quarter of southwest quarter (NW¼ of SW¼), section seven (7), in township five (5) north of range thirty (30) east of the Willamette Meridian.

These defendants deny that plaintiff and his grantors have been the owners in fee and in possession of the land described in the complaint under a claim of right, title and interest and color of title thereto for ten years prior to the commencement of this suit, adversely to these defendants and to all the world.

These defendants admit that the defendant Northern Pacific Railway Company claims to be the owner in fee of, and the defendant

The Farmers' Loan and Trust Company claims to have an
53 interest in, all of the lands described in the complaint, excepting said south half of northeast quarter (S½ of NE¼), south half of northwest quarter (S½ of NW¼) and northwest quarter of southwest quarter (NW¼ of SW¼), section seven (7), in township five (5) north of range thirty (30) east of the Willamette Meridian, hereinabove referred to, and excepting lot four (4), in section five (5), the north half of northeast quarter (N½ of NE¼) of section seven (7), and the northwest quarter of northeast quarter (NW¼ of NE¼) and northeast quarter of northwest quarter (NE¼ of NW¼), of section eight (8), all in township five (5) north of range thirty (30) east of the Willamette Meridian.

And the defendants make the following further and separate answer to the complaint herein:

On or about December 31, 1907, the United States conveyed to the defendant Northern Pacific Railway Company by patent said lot one (1) of section five (5), in township five (5) north of range thirty (30) east of the Willamette Meridian; on or about May 4, 1909, the United States conveyed to the defendant Northern Pacific Railway Company by patent lot two (2) of said section five (5); on or about November 25, 1907, the United States conveyed to the defendant Northern Pacific Railway Company by patent north half of northwest quarter (N½ of NW¼), also known as lots one
54 (1) and two (2) of section seven (7), in said township and range; on or about June 8, 1906, the United States conveyed to the defendant Northern Pacific Railway Company by patent the northeast quarter of southwest quarter (NE¼ of SW¼) of said section seven (7); and on or about May 4, 1909, the United States conveyed to the defendant Northern Pacific Railway Company by patent the northwest quarter of southeast quarter (NW¼ of SE¼), southwest quarter of southwest quarter (SW¼ of SW¼) and southeast quarter of southwest quarter (SE¼ of SW¼) of said section seven (7). These defendants allege that by virtue of the title so conveyed by said patents of the United States the defendant Northern Pacific Railway Company is the owner in fee and entitled to the possession of the lands so conveyed by said patents, and the defendant The Farmers' Loan and Trust Company has a lien thereon under and by virtue of a mortgage or deed of trust made and executed by the defendant Northern Pacific Railway Company. Each and all of said patents so conveying the land to the defendant Northern Pacific Railway Company were issued by the proper officers of the United States under an Act of Congress of the United States, approved July 2, 1864, entitled, "An act granting lands to aid in the construction of a railroad and telegraph lines from Lake Superior to Puget Sound, on the Pacific Coast by the Northern route."

For their further and separate answer to the complaint
55 herein, these defendants allege that on and prior to October 11, 1912, said lot four (4) of section five (5), in township five (5) north of range thirty (30) east of the Willamette Meridian, was public land of the United States; that on said day the defendant Northern Pacific Railway Company filed in the United States Land

Office at La Grande, Oregon, its Mineral Indemnity Selection List, by which it made selection in conformity with the laws of the United States of said lot four (4); said selection list was duly approved by the local land office of the United States, and since said time has been pending and still is pending in the General Land Office of the United States awaiting approval or rejection by the proper officers of the Land Department of the United States.

These defendants therefore allege that this court is without jurisdiction to try and determine the title to and ownership of said lot four (4).

For their further and separate answer to the complaint herein, these defendants allege that on and prior to the 23d day of July, 1908, said north half of northeast quarter (N½ of NE¼) of section seven (7), in township five (5) north of range thirty (30) east of the Willamette Meridian, was public land of the United States; that on said day the defendant Northern Pacific Railway Company filed in the United States Land Office at La Grande, Oregon, its Mineral Indemnity Selection List, by which it made selection in con-
56 formity with the laws of the United States of said north half of northeast quarter (N½ of NE¼) of section seven (7); said selection list was duly approved by the local land office of the United States and since said time has been pending and still is pending in the General Land Office of the United States awaiting approval or rejection by the proper officers of the Land Department of the United States.

These defendants therefore allege that this court is without jurisdiction to try and determine the title to and ownership of said north half of northeast quarter (N½ of NE¼) of section seven (7).

For their further and separate answer to the complaint herein, these defendants allege that on and prior to March 19, 1908, said northwest quarter of northeast quarter (NW¼ of NE¼) and northeast quarter of northwest quarter (NE¼ of NW¼) of section eight (8), in township five (5) north of range thirty (30) east of the Willamette Meridian, was public land of the United States; that on that day the United States conveyed the said tracts by patents duly and lawfully issued to the defendant Northern Pacific Railway Company. Thereafter and prior to the commencement of this suit, the defendant Northern Pacific Railway Company conveyed the said tracts to Joseph C. Scott, and as these defendants are informed and believe, said Joseph C. Scott is still the owner in fee of said
57 tracts. The said Joseph C. Scott, as these defendants are informed and believe, is still living and this suit as to the said northwest quarter of northeast quarter (NW¼ of NE¼) and northeast quarter of northwest quarter (NE¼ of NW¼) of section eight (8), cannot properly proceed to a determination without the presence as a party thereto of the said Joseph C. Scott.

Wherefore, these defendants pray that this court adjudge and decree that the defendant Northern Pacific Railway Company is the owner in fee and entitled to the possession of said lots one (1) and (2) of section five (5), north half of northwest quarter (N½ of NW¼) of section seven (7), northeast quarter of southwest quarter

(NE¼ of SW¼) of section seven (7) and northwest quarter of southeast quarter (NW¼ of SE¼), southwest quarter of southwest quarter (SW¼ of SW¼) and southeast quarter of southwest quarter (SE¼ of SW¼) of section seven (7), all in township five (5) north of range thirty (30) east of the Willamette Meridian, and that its title thereto be quieted, save as to the mortgage lien thereon of the defendant The Farmers' Loan and Trust Company, and that the defendant The Farmers' Loan and Trust Company has a lien upon said lands by virtue of a mortgage or deed of trust executed and delivered by the defendant Northern Pacific Railway Company; and that this suit be dismissed as to the said lot four (4) of section five (5), north half of northeast quarter (N½ of NE¼) of sec-
58 tion seven (7), and northwest quarter of northeast quarter (NW¼ of NE¼) and northeast quarter of northwest quarter (NE¼ of NW¼) of section eight (8), in township five (5) north of range thirty (30) east of the Willamette Meridian; that these defendants be given judgment for costs and their disbursements, and be given such other and further relief as may be equitable.

Thereafter and on the 13th day of January, 1913, the plaintiff served and filed the following Reply:

Reply.

Comes now the plaintiff and for reply to the answer filed herein, admits and denies as follows:

I.

For reply to the first further and separate answer, the plaintiff denies each and every allegation therein contained, excepting as alleged in the complaint.

II.

For reply to the second further and separate answer, the plaintiff denies each and every allegation therein contained, excepting as alleged in the complaint.

III.

In reply to the third further and separate answer, plaintiff denies each and every allegation therein contained, excepting as alleged in the complaint.

59 Wherefore, the plaintiff prays as in the complaint.

Transcript of Testimony and Proceedings.

On the 7th day of December, 1915, said cause was tried to the court without a jury, the following proceedings being had upon the trial:

This cause came on regularly for hearing before the Honorable G. W. Phelps, Circuit Judge of the Sixth Judicial District of the State of Oregon, at Pendleton, Oregon, on the 7th day of December, 1915, plaintiff appearing by his counsel, Messrs. Raley and Raley, and defendants appearing by their counsel, C. A. Hart, Esq. The following proceedings were had, to-wit:

Plaintiff and defendants hereby stipulate that the following statement with reference to the lands described in the complaint may be taken as the facts in this case:

Section 5, Township 5 North or Range 30 East.

Lot One. Plaintiff hereby withdraws the claim made in the complaint as to this lot, and decree may be entered herein confirming defendants' title.

Lot Two. This lot was patented to defendant Railway Company on May 4, 1909, under the terms of the Act of July 2, 1864 (13 Statutes at Large, 365). Previously, however, it had been included in a so-called Swamp Land Selection List filed by the State
60 of Oregon under date of November 23, 1872, under the terms of the Swamp Land Act of Congress of 1850, as extended and applied to the State of Oregon by the Act of March 12, 1860. The claim of the State of Oregon thus asserted by the filing of this Swamp Land List has never been adjusted. On August 10, 1892, the State of Oregon conveyed this lot to Mary Switzler, and she thereafter conveyed said lot to plaintiff in this case.

On December 4, 1912, defendant Northern Pacific Railway Company, assuming that this lot was excluded from its grant because of the existence at the time of definite location of the Swamp Land claim of the State of Oregon, and that the lot therefore was patented to the Railway Company in error, reconveyed the said lot to the United States by deed dated December 4, 1912, and said reconveyance was duly recorded in the office of the County Clerk of Umatilla County on January 15, 1915, in Volume 82, of Deeds, pages 34 and 35.

Thereafter, and on January 17, 1913, defendant Northern Pacific Railway Company filed in the local Land Office of the United States at La Grande, Oregon, its Mineral Indemnity Selection List No. 107, selecting lot 2 in lieu of land lost from its grant of July 2, 1864, because of the classification as mineral lands of said lands within the place limits of the grant; and said Northern Pacific Railway Company claims said lot 2 by virtue of said selection list and by virtue of the terms and conditions of the Act of Congress approved July 2, 1864.

Lot Four. This lot was included in the Swamp Land List
61 filed by the State of Oregon on November 23, 1872 (as described in the next preceding paragraph), and thereafter, to-wit, on August 10, 1892, was conveyed by the State of Oregon to Mary Switzler and by her to the plaintiff herein. Thereafter the swamp land claim thus asserted by the State of Oregon was rejected by the General Land Office of the United States.

Defendant Northern Pacific Railway Company made claim to this lot by the filing of its Mineral Indemnity Selection List No. 101, serial No. 011236, which selection list was approved by the local Land Office of the United States on October 11, 1912; and defendant Railway Company now asserts claim to said lot by virtue of said selection list and under the terms of the Act of Congress, approved July 2, 1864.

Section 7, Township 5 North of Range 30 East.

The South Half of Northeast Quarter. The defendants in their answer disclaim any interest in this property and now repeat said disclaimer, and the title of the plaintiff in said tract may be confirmed by decree.

The North Half of Northeast Quarter. This tract was included in the Swamp Land List filed by the State of Oregon on November 23, 1872, (under Swamp Land Acts of Congress of 1850 and 1860 above referred to). The claim of the state thus asserted was therefore rejected by the General Land Office of the United States. On
August 10, 1892, the State of Oregon conveyed the tract to
62 Mary Switzler and John Switzler and by *mense* conveyances said tract was later conveyed to the plaintiff herein.

Defendant Railway Company made claim to this tract by filing its Mineral Indemnity Selection List No. 67, serial No. 0540, specifying, among other lands, this property, which selection list was approved by the local Land Office of the United States on July 23, 1908; and the defendant Railway Company makes claim to this tract by virtue of the filing of said selection list and under the terms of the Act of Congress, approved July 2, 1864.

South Half of Northwest Quarter. Defendants in their answer disclaim any interest in this tract and now repeat their disclaimer, and agree that plaintiff's title thereto may be confirmed by decree.

Lots One and Two (or Fractional North Half of Northwest Quarter). This tract was included in the Swamp Land List filed by the State of Oregon on November 23, 1872 (under the Swamp Land Act of Congress hereinabove referred to), not yet adjusted. The tract was conveyed by the State of Oregon to John Switzler on August 10, 1892, and by him through *mense* conveyances to plaintiff.

This tract was patented to defendant Railway Company on December 31, 1907. The Railway Company assuming that said tract was excluded from its grant because of the existence at the time of definite location of the swamp land claim of the State of Oregon,

and assuming that the patent to the Railway Company was
63 erroneous, reconveyed said tract to the United States under date of December 4, 1912, said reconveyance being thereafter duly recorded in the office of the County Clerk of Umatilla County in Volume 82 of Deeds, at pages 34 and 35.

Thereafter defendant Railway Company made claim to this tract by filing in the Local Land Office of the United States at La Grande, Oregon, its Mineral Indemnity Selection List No. 107, dated January 17, 1913, which list specified, among other tracts, this property; and the Railway Company now asserts claim to this tract by virtue of said selection list and under the terms of the Act of Congress, approved July 2, 1864.

Northwest Quarter of Southwest Quarter. Defendants in their answer disclaim any interest in this tract and now repeat said disclaimer, and agree that plaintiff's title may be confirmed by decree.

Northeast Quarter of Southwest Quarter. This tract was included in the Swamp Land List filed by the State of Oregon on November 23, 1872 (under the Swamp Land Acts of Congress hereinabove referred to). The claim of the State of Oregon thus asserted was therefore rejected by the General Land Office of the United States. Prior to such rejection, to-wit, March 15, 1895, the State of Oregon conveyed said tract to Delia Switzler and through *mense* conveyances the tract was thereafter conveyed to plaintiff herein.

This tract was originally patented to the defendant Railway Company on June 8, 1906, under the terms of the Granting Act
64 of July 2, 1864 (13 Statutes at Large, 365). Defendant Railway Company assuming that said tract was excluded from its grant because of the existence of the swamp land claim of the State of Oregon at the time of definite location, reconveyed said tract to the United States on December 4, 1912, said reconveyance being duly recorded in the office of the County Recorder of Umatilla County in Book 82 of Deeds, at pages 34 and 35.

Thereafter defendant Railway Company filed in the Land Office of the United States at La Grande, Oregon, its Mineral Indemnity Selection List No. 106, which list specified this tract, and said selection list was on January 17, 1913, duly approved. Based upon the selection so made by the Railway Company, the tract was, on May 25, 1914, patented to the defendant Railway Company, said patent being duly recorded in the office of the County Recorder of Umatilla County, in Book 89 of Deeds, at page 99. The Railway Company now asserts claim to said lot by virtue of said patent and by virtue of the rights given it by Act of Congress, approved July 2, 1864.

Northwest Quarter of Southwest Quarter; Southwest Quarter of Southwest Quarter; Southeast Quarter of Southwest Quarter. This land was patented to the defendant Railway Company on May 4, 1909. Plaintiff withdraws the claim made to it in the complaint herein and agrees that defendants' title thereto may be confirmed.

65 Section 8, Township 5 North of Range 30 East.

Northwest Quarter of Northeast Quarter; Northeast Quarter of Northwest Quarter. The plaintiff now withdraws the claim made

in the complaint as to this land and agrees that defendants' title thereto may be confirmed by decree.

All of the lands in controversy in this suit are within the forty-mile place limits of the branch line of the Northern Pacific Railway Company constructed from Ainsworth to Yakima City. The line of definite location for said branch line of Northern Pacific Railway Company from Ainsworth to Yakima City was duly filed in the General Land Office of the United States under the terms of the Granting Act of July 2, 1864 (13 Statutes at Large, 365), on the 29th day of June, 1883; that no action has been taken by any officer of the United States upon said Swamp Land List prior to June 29, 1883.

John B. Switzler, being called and sworn as a witness on the part of plaintiff, testified as follows:

(Here follows plaintiff's proof of possession):

Thereafter and on the 28th day of March, 1916, the court made and filed the following Opinion herein:

Opinion.

Passing preliminary statements, there being no disagree-
66 ment as to facts, and without a detailed discussion of the law or of the numerous cases cited by one side or the other, I will state briefly the conclusion reached after a very careful examination of the authorities cited, and a very careful consideration of the respective briefs.

It is conceded that the lands in controversy passed to the Northern Pacific Railroad Company immediately upon the filing by said company of its map of definite location on June 29, 1883, unless at that time the said lands were not free from "pre-emption or other claims or rights."

It is the contention of defendant that the Swamp Land Selection List of the State of Oregon was at the time of the filing of the map of definite location a "claim" against the land which would exempt same from the grant to the Railroad Company.

If this contention be upheld, then it follows as a matter of course that the lands remained public lands, and title did not pass to plaintiff or his predecessors by adverse possession. Otherwise title did pass.

In the case of Pengra v. Munz, 29 Fed. 830, it is held by Judge Deady in effect that the failure of the proper state officials to file a list of the lands selected under the Swamp Land Act prior to the year 1872 was relinquishment of any right or claim the state might have as against the lands.

67 This decision is severely criticised by counsel for defendant, and it is strongly urged that it should not be followed. The case of Gaston v. Stott, 5 Ore. 48, is cited as holding a contrary doctrine, but the point of importance in that case was as to whether or not the grant was one in praesenti, and the opinion of Justice McArthur was later expressly overruled in the cases of Small v. Lutz, 41 Ore. 577, and Morrow v. Warner Valley Stock Co., 56 Ore. 329.

These last-mentioned cases having been decided after the Supreme Court of the United States had passed upon the subject in the cases of Michigan L. & L. Co. v. Rust, 168 U. S. 589, and Brown v. Hitchcock, 173 U. S. 473.

However, Gaston v. Stott, if authority to be recognized for any purpose, after being overruled as mentioned, holds that the state did not lose its rights because its officers did not act more promptly.

This contention is supported by later authorities, as cited by counsel for defendants, and while there is to be found both law and basis for argument on each side of the question, it seems to me that defendants' position as to this question must ultimately prevail whenever the higher courts are called upon to decide.

It is not so clear, however, that subordinate state courts should not follow the case of Pengra v. Munz supra, until the question is finally settled by the appellate courts upon the particular
68 question raised here. A federal question is involved, and while, indeed, the state courts are only bound by the ruling of the Supreme Court of the United States, yet there should be manifest error before the refusal to follow the United States District Court upon a federal question.

But assuming that the state forfeited no rights by its failure to act more promptly, there still remains what seems to me to be, in its final analysis, the real question in the case, and that is what was meant by the words, "free from pre-emption or other claims or rights" in the Act of July 2, 1864?

It is plaintiff's contention that these words referred only to claims of record or to those recognized officially by some officer of the government. He cites the case of N. P. R. R. Co. v. Coleburn, 164 U. S. 383. In this case it is held that the claim or right need not necessarily be one of record, but that it must be a bona fide claim, and such as indicates an intention to perfect the claim.

When analyzed, there is no inconsistency in the several decisions urged upon the court by both parties to this suit.

But there is to be found in all of the decisions upon the subject an evident purpose to say that it is not every claim that answers the requirements of the law so as to prevent the passing of title under the particular grant then being considered. It is settled be-
69 yond controversy that the claim need not be one of record, but it seems to me to be equally well settled that where under a given state of facts a court of equity should say that a party is guilty of laches in not pursuing a claim or demand, then, as a matter of law, by non-action the claim, though sufficient at one time, becomes insufficient when it is allowed to become stale. And while it may be assumed that the filing of the Swamp Land List in 1872 constituted a claim sufficient at the time to withhold the selections from passing had the map of definite location been then or within a reasonable time thereafter filed by the Railroad Company, yet it by no means follows that such would be the legal effect for all future time.

It seems to me that the court should look to the conditions existing in the year 1883, and from all the facts and circumstances say

whether at that time there was a "claim" within the contemplation of the law.

The question is not easy of solution, but it is my opinion that if the State of Oregon ever had a valid claim against this land, there had been no act to indicate at the time of the definite location that the state was still claiming this land under the Swamp Land Act or otherwise. In fact, it would seem that there had been a complete abandonment of any claims the state theretofore had, and this conclusion is backed up by the subsequent acts of both the state and the United States, when patents passed to the defendant. It
70 would also seem that defendants' act in first accepting the patents and then undertaking to reconvey to the government was done to prepare for this particular case.

Upon the case as a whole, I am of the opinion that even though the state's claim was filed within the time limit, and at the time constituted a "claim" within the meaning of the Act of 1864, and within the construction of the word as found in the decisions cited, yet by the same authorities the claim made by the state in 1872 would not be recognized by the courts as a claim in 1883 sufficient to exclude the lands from the grant to the defendants.

It follows under the evidence that plaintiff and his predecessors obtained title by adverse possession, and finding will be made accordingly.

On the 7th day of April, 1916, the court made and entered the following Findings of Fact and Conclusions of Law:

Findings of Fact and Conclusions of Law.

This matter coming on now for consideration by the court, the plaintiff having heretofore appeared in this cause by Messrs. Raley and Raley, his attorneys, and the defendants appearing herein by their counsel, Carey and Kerr and C. A. Hart, Esq., and the court having heretofore taken and heard such testimony as each of the parties hereto had to offer in said cause, and having listened
71 to arguments and duly considered the briefs of both plaintiff and defendants, and being advised upon the record, the evidence and testimony in said cause, now makes, finds and files the following:

Findings of Fact.

I.

That the plaintiff and defendants, through their respective counsel, have filed a stipulation in this cause, in words and figures as follows:

(Here follows facts as stipulated and as shown in Transcript.)

And based upon said stipulation and agreement and the record, evidence and testimony in this case, the court further finds as follows:

II.

That plaintiff withdraws his claim made in the complaint as to lot 1 of section 5, township 5 north of range 30 east.

III.

Plaintiff withdraws his claim to the northwest quarter of the southeast quarter, and the southwest quarter of the southwest quarter, and the southeast quarter of the southwest quarter of section 7, township 5 north of range 30 east.

IV.

The plaintiff withdraws his claim to the northwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter of section 8, township 5 north of range 30 east.

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V.

That the defendants disclaim any interest in and to the south half of the northeast quarter, and the south half of the northwest quarter, and the northwest quarter of the southwest quarter of section 7, township 5 north, range 30 east, W. M.

VI.

That the lands remaining in controversy and involved in this suit are lots 2 and 4 of section 5, and the north half of the northeast quarter, and lots 1 and 2, and the northeast quarter of the southwest quarter of section 7, township 5 north of range 30 east, W. M.

VII.

That the State of Oregon filed a Swamp Land Selection List under date of November 23, 1872, for the lands in controversy, under the terms of the Swamp Land Act of Congress of 1850, as extended and applied to the State of Oregon by the Act of March 12, 1860, and that no action had been taken by any officer of the United States upon said Swamp Land List prior to June 29, 1883.

VIII.

That with the exception of the filing of the Swamp Land List on November 23, 1872, neither the State of Oregon nor any one else has taken any further steps at any time to perfect the title to said list or to secure patent to the State of Oregon for said lands, or any part thereof.

73

IX.

That the lands in controversy are all within the forty-mile place

limits of the branch line of the Northern Pacific Railway Company, constructed from Ainsworth to Yakima City.

X.

That the line of definite location for said branch line of the Northern Pacific Railway Company from Ainsworth to Yakima City was duly filed in the General Land Office of the United States under the terms of the Granting Act of July 2, 1864, on the 29th day of June, 1883.

XI.

That the plaintiff and his grantors and predecessors in interest have been in the actual possession of the lands in controversy, and each and every part thereof, under a claim of right, title and interest and under color of title thereto, by deeds from the State of Oregon bearing dates, respectively, of August 10, 1892, and of March 15, 1895, claiming and holding the same adversely to the defendants and to all the world for long prior to and ever since the 15th day of March, 1895, and are now so in possession and so holding and claiming the lands in controversy, and each and every part thereof, by color of title as aforesaid.

XII.

That while so holding and claiming said lands under color of title as aforesaid, the grantors of the plaintiff expended a large
74 sum of money, to-wit, approximately the sum of $10,000, upon said lands in the erection of buildings, planting out of orchards, building fences and general farm improvements, and the plaintiff is now the owner and holder of such color of title and improvements, by and through mesne conveyances thereto.

XIII.

That no patent or other conveyance was ever issued by the United States to the State of Oregon for any of the lands in controversy.

XIV.

That on the 31st day of December, 1907, the United States issued its patent to the defendant for lots 1 and 2 of section 7, under the General Granting Act of 1864, for place lands, and on the 9th day of June, 1906, the United States issued its patent to the northeast quarter of the southwest quarter of said section 7 as place lands under the General Granting Act of 1864, and on May 4, 1909, the United States issued to the defendant its patent for lot 2 as place lands under the General Granting Act of 1864, and that the defendant received and accepted such patents from the United States so conveying said lands as lands in the place limits under said grant.

XV.

And the court further finds that the defendant the Northern Pacific Railway Company is now and was at all the times mentioned in the complaint a corporation duly incorporated, organized
75 and doing business under the laws of the State of Wisconsin, owning and operating a railway line and owning lands connected there with in the State of Oregon.

XVI.

That the Farmers' Loan and Trust Company, Trustee, is and was at all the times herein mentioned a corporation, duly incorporated, organized and doing business in the State of New York and State of Oregon, under and by virtue of the laws of the State of New York.

XVII.

That the lands in controversy, as hereinbefore described, are not now and never have been in the possession of any person or persons excepting the plaintiff and his grantors by mesne conveyances.

XVIII.

The court further finds that lot 4 of section 5, in township 5 north of range 30 east, W. M., was not public lands of the United States on the 11th day of October, 1912, and that such lot never has been public lands of the United States since the 29th day of June, 1883.

XIX.

That the north half of the northeast quarter of section 7, in township 5 north, range 30 east, W. M., was not public lands of the United States on the 23d day of July, 1908, and never have been such public lands since the 29th day of June, 1883.

76 XX.

That on the 4th day of December, 1912, the defendant attempted to reconvey the lands in controversy to the United States, and to that end did make, execute and deliver a quitclaim deed therefor, and the court further finds that such quitclaim deed was without force or effect to restore the said lands so deeded, or any part thereof, to the public domain of the United States.

XXI.

That the equities are all with the plaintiff and against the defendants.

And based upon the foregoing Findings of Fact, the court makes, finds and files the following

Conclusions of Law.

I.

That the defendant has good and valid claim to lot 1 of section 5, and the northwest quarter of the southeast quarter, and the southwest quarter of the southwest quarter, and the southeast quarter of the southwest quarter, of section 7, and the northwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter of section 8, all in township 5 north, range 30 east of the Willamette Meridian, and the plaintiff has no claim or interest or estate in or to any part of said property.

II.

77 That the plaintiff is the owner of the south half of the northeast quarter, and the south half of the northwest quarter, and the northwest quarter of the southwest quarter of section 7, in township 5 north, range 30 east of the Willamette Meridian, and that the defendant has no interest or claim or estate in and to the said lands or any part thereof.

III.

That lots 2 and 4 of section 5, and the north half of the northeast quarter, and lots 1 and 2, and the northeast quarter of the southwest quarter of section 7, township 5 north of range 30 east, W. M., are odd-numbered sections within the forty-mile place limits of the branch line of the Northern Pacific Railway Company, constructed from Ainsworth to Yakima City, by reason of the terms of the Granting Act of July 2, 1864, and that ever since the 29th day of June, 1883, the legal title to said property, and each and every part of it, has been in the Northern Pacific Railway Company.

IV.

That the plaintiff and his grantors and predecessors in interest have acquired title to the said lots 2 and 4 of section 5, and the north half of the northeast quarter, and lots 1 and 2, and the northeast quarter of the southwest quarter of section 7, in township 5 north of range 30 east, W. M., by adverse possession and occupancy under color of title, and the plaintiff is now the sole and only owner of said lands, and of each and every part thereof.

78 V.

That neither the defendants nor any of them, nor any person claiming by, through or under them or any of them, now have or are entitled to have or claim any interest or estate in said tracts of land, or any part thereof.

VI.

That the deed from the defendants to the United States was without effect to restore the said lands so deeded, or any part thereof, to the public domain of the United States.

VII.

That the defendants acquired no interest or estate in said lands, or any part thereof, by reason of any filings, claims or patents acquired from the United States thereto subsequent to said deed.

VIII.

That the plaintiff is entitled to decree quieting his title to the lands in controversy.

Thereafter defendants duly served and filed their objections to plaintiff's proposed Findings of Fact and Conclusions of Law as follows:

Objections of Defendants to Plaintiff's Proposed Findings of Fact and Conclusions of Law.

Now comes defendants and make the following objections to plaintiff's proposed Findings of Fact and Conclusions of Law:

79 Defendants object to Finding of Fact numbered VIII, for the reason that there is no evidence in the record to sustain any such finding. The record does not show what, if any, steps were taken by the State of Oregon after the filing of its list on November 23, 1872, in the effort to perfect title to the lands described in said list, but some of the lands included in said list and included in this complaint as to which defendants have disclaimed were in fact subsequently patented to the State of Oregon as a result of their being so listed.

Defendants object to Findings numbered XVIII and XIX, upon the ground that the evidence herein does not warrant a finding that the lands therein described were not the public lands of the United States on October 11, 1912, and were not such public lands since June 29, 1883.

Defendants object to Finding numbered XX, upon the ground that the record herein does not warrant a finding to the effect that the quit claims executed by defendant Northern Pacific Company to the United States were without force or effect to restore the lands deeded to the public domain of the United States.

Defendants object to proposed Conclusions of Law numbered III, IV, V, VI, VII and VIII, upon the ground that the evidence herein and the facts proven thereby do not justify the conclusions of law so proposed.

80 Defendants further object to said Conclusions of Law upon the ground that under and by virtue of the provisions of the Act of Congress of July 2, 1864, said lands in controversy, to-wit, lots 2 and 4 of section 5, north half of northeast quarter, lots 1 and 2 and northeast quarter of southwest quarter of section 7, all in township 5 north of range 30 east of Willamette Meridian, were not, on June 29, 1883, when map of definite location of the railway of the defendant Northern Pacific Railway Company, from Ainsworth to Yakima City, was filed, public lands free from any claim, within the meaning of said act, and therefore did not pass to or become the property of defendant Northern Pacific Railway Company, at the time and because of the filing of said map of definite location on June 29, 1883; and therefore that plaintiff and his predecessors have not acquired any rights to said lands by virtue of possession.

On the 7th day of April, 1916, the court made and entered the following Decree:

Decree.

This cause having been heretofore tried in open court, the plaintiff appearing by Raley and Raley, his attorneys, and the defendants appearing by Carey and Kerr and C. A. Hart, their attorneys; and the court having listened to the arguments and considered the evidence in said cause, and being fully advised, and having heretofore made and signed and caused to be filed herein its Findings
81 of Fact and Conclusions of Law, and being now advised in the premises and advised as to what decree the court ought to render in said cause,

It is now considered, ordered, adjudged and decreed that the defendant the Northern Pacific Railway Company has valid claims to lot 1 of section 5, and the northwest quarter of the southeast quarter, and the southwest quarter of the southwest quarter, and the southeast quarter of the southwest quarter of section 7, and the northwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter of section 8, all in township 5 north of range 30 east of the Willamette Meridian, and that the plaintiff has no claim or interest or estate in or to any part of said last above described property.

And it is further considered, ordered, adjudged and decreed that the plaintiff is the owner of the south half of the northeast quarter, and the south half of the northwest quarter, and the northwest quarter of the southwest quarter of section 7, in township 5 north of range 30 east of the Willamette Meridian, and that the defendant has no interest or claim or estate in or to the said lands, or any part thereof.

And it is further considered, ordered, adjudged and decreed that the plaintiff E. W. McComas is the owner of and is in possession of and entitled to the possession of lots 2 and 4 of section 5, and the

north half of the northeast quarter, and lots 1 and 2, and
82 the northeast quarter of the southwest quarter of section 7, in township 5 north of range 30 east of the Willamette Meridian, and that neither the defendants, nor any of them, nor any person claiming by, through or under them, or any of them, now have or are entitled to have or claim any interest or estate in said tracts of land, or any part thereof.

And it is further considered, ordered, adjudged and decreed that the title of plaintiff E. W. McComas in and to lots 2 and 4 of section 5, and the north half of the northeast quarter, and lots 1 and 2, and the northeast quarter of the southwest quarter of section 7, in township 5 north of range 30 east of the Willamette Meridian, be and the same hereby is forever decreed to be quieted and freed from all claims of every kind and character in any manner asserted or claimed to be asserted by the defendants, or either or any of them.

And it is further considered, ordered, adjudged and decreed that plaintiff have and recover of and from the defendant the Northern Pacific Railway Company his costs and disbursements in this suit, taxed at $38.65, and that execution issue to enforce this decree.

Thereafter, and on the 25th day of April, 1916, the defendant appealed from the decree herein to the Supreme Court of the State of Oregon, and on the 25th day of April, 1916, filed its

83 *Notice of Appeal.*

with proof of due service. And thereafter, within the time provided by law, served its undertaking on appeal, with proof of due service.

Assignments of Error.

I.

The court erred in finding (Finding of Fact VIII) that, with the exception of the filing of the Swamp Land List of November 23, 1872, neither the State of Oregon nor anyone else has taken any further steps at any time to perfect the title to said list or to secure patent to the State of Oregon for the lands in controversy, or any part thereof.

II.

The court erred in finding and determining (Findings of Fact XVIII and XIX) that lot 4 of section 5, township 5 north, range 30 east, was not public lands of the United States on October 11, 1912, and that said lot has never been public lands of the United States since June 29, 1883; and that the north half of northeast quarter of section 7, township 5 north, range 30 east, was not public lands on July 23, 1908, and never has been such public lands since June 29, 1883.

III.

The court erred in finding and determining (Finding of Fact XX) that the quitclaim deed of defendant Northern Pacific Railway Company, by which certain of the lands in controversy were
84 attempted to be reconveyed to the United States, was without force or effect to restore the lands deeded to the public domain of the United States.

IV.

The court erred in finding and determining (Finding of Fact XXI) that the equities are with the plaintiff and against defendants.

V.

The court erred in concluding (Conclusion of Law III) that lots 2 and 4 of section 5, the north half of northeast quarter, and lots 1 and 2, and northeast quarter of southwest quarter of section 7, under the terms of the Act of Congress approved July 2, 1864, have been the property of the Northern Pacific Railway Company since June 29, 1883.

VI.

The court erred in holding (Conclusion of Law IV) that plaintiff and his grantors and predecessors have acquired title to the property last above described by adverse possession and occupancy under color of title, and that plaintiff is now sole and only owner of said lands.

VII.

The court erred in failing and refusing to find that under the terms of the Act of Congress approved July 2, 1864, granting lands to Northern Pacific Railroad Company, predecessor of defendant Northern Pacific Railway Company, said lands last above described
85 were excepted from the lands granted to said Railroad Company, because of the fact that at the time of the definite location of said railway (June 29, 1883), said lands were included in the list filed with the Land Department of the United States under which list the State of Oregon claimed ownership of said lands under the terms of the Swamp Land Acts of September 28, 1850, and March 12, 1860.

VIII.

The court erred in failing and refusing to hold that said lands last above described did not become the property of the Northern Pacific Railroad Company upon definite location of the railroad of said Railroad Company on June 29, 1883, but remained public lands of the United States under and by virtue of the terms of the Granting Act of July 2, 1864; and in failing and refusing to hold that said lands under the terms of said act of July 2, 1864, remained public lands

until the filing of the Indemnity Selection Lists by defendant Northern Pacific Railway Company less than ten years prior to the commencement of this suit.

IX.

The court erred in failing and refusing to hold that the patents of the United States to defendant Northern Pacific Railway Company covering lots 1 and 2 of section 7, and northeast quarter of southwest quarter of section 7, and lot 2 of section 5, all in township 5 north of range 30 east, did not operate to convey said lands to de-
86–88 fendant Railway Company because said lands were under the terms of the act of July 2, 1864, excluded from the lands granted.

X.

The court erred in decreeing that plaintiff is the owner of said lands and in decreeing that his title thereto be quieted.

CAREY AND KERR AND
CHARLES A. HART,
Attorneys for Appellants.

89 In the Supreme Court of the State of Oregon. In Banc.

E. W. McComas, Respondent,

v.

Northern Pacific Railway Company, a Corporation; The Farmers' Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Appellants.

Appeal frm Umatilla County.

Hon. Gilbert W. Phelps, Judge.

Argued and Submitted Nov. 1, 1916.

J. H. Raley (Raley & Raley, on brief) for Respondent.
Charles A. Hart, (Carey & Kerr on brief) for Appellants.

Burnett, *J.*:

Affirmed.

Filed Dec. 19, 1916. J. C. Moreland, Clerk of the Supreme Court By —— ——.

90 This is a suit to quiet title to certain lands in Umatilla County. The plaintiff asserts title by prescription. The defendants claim under the act of Congress of July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and

telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route." 13 Stat. At Large, p. 365. From a decree in favor of the plaintiff the defendants appealed.

BURNETT, *J.*:

Although other lands are included in the complaint the parties stipulated disposing of the title to all except the following: Lots 2 and 4 of section 5, and lots 1 and 2, the north half of the northeast quarter, and the northeast quarter of the southeast quarter of section 7, all in township 5 north, range 30 east W. M. There is substantially no dispute about the facts in the case. Section 3 of the congressional enactment mentioned reads in part as follows: "That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. * * * Provided, further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may
91 be selected as above provided. * * *" The line of the road was definitely fixed and the plat thereof filed in the office of the commissioner of the general land office June 29, 1883. This act has been construed to operate as a present grant beginning with that date so that co instanti the title of the grantee vested in all lands to which the statute applied. It appears that the Governor of Oregon operating under "An Act to enable the state of Arkansas and other states to reclaim the swamp land within their limits," approved September 28, 1850, and made applicable to the states of Minnesota and Oregon by the act of March 12, 1860, filed with the proper authorities of the general government in 1872 a list of lands including those in controversy which it claimed were swamp lands inuring to the state of Oregon under the acts of Congress last mentioned. On August 10, 1892, and March 15, 1895, the state of Oregon conveyed these lands to the plaintiff's predecessors in interest from whom by

mesne conveyance he deraigns title. The grantee in those deeds at once entered into possession of the realty therein described and they and their successors in interest have continuously maintained that tenure until the present time claiming title, and have made improvements on the premises amounting in value to $10,000.00 and upwards. As before stated, the plaintiff contends that this constitutes adverse possession under color of title which vests in him the fee simple estate as against the defendants, although, as the fact appears to be as to some of the disputed subdivisions, the swamp land claim of the state of Oregon has never been adjusted while as to others it has been rejected by the officers of the general government. It is agreed that all the realty in question lies within the forty
92 mile place limits of the railway line so that if no claim existed against it at the time the line of the road was definitely fixed it would be among the twenty alternate sections per mile on each side of the designated line of road. The contention of the defendants is that the presence of the state's swamp land list in the proper United States Land Office constituted a claim against the land which took it out of the operation of the grant with the result that the tracts were part of the public domain and not subject to holding by adverse title. Some of this very land was patented to the defendant railway company which assuming that the patent had been issued inadvertently, quitclaimed the property to the United States and then after the commencement of this suit filed in the United States Land Office at La Grande what it termed mineral indemnity selections covering the most of the premises in controversy. The defendants say these selections have been approved and depend upon them for their title to the land.

Conceding, as the precedents seem to hold, that the filing of the swamp land list by the state of Oregon constituted a claim within the meaning of the railway grant excluding the lands from its operation proves too much for the defendants. The plaintiff has clearly established color of title by deed from the state for the very land. He deraigns title from this source which the defendants say took the property out of the operation of the grant. It is beyond question that the property has been in the exclusive possession of the plaintiff and his grantors under this color of title for more than ten years prior to the commencement of the suit.

The authority for filing mineral indemnity selections is found in the provision of the congressional statute "that all mineral lands be and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unap-
93 propriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided," that is to say, "no more than ten miles beyond the limits of said alternate section." The indemnity, therefore, must be taken out of unoccupied agricultural lands, but this land has been in fact occupied all this time. Moreover, in Bardon v. N. P. R. R. Co., 145 U. S., 535, 545, the supreme court of the United States, speaking by Mr. Justice Field, in construing this same legislation, said: "Not only does the land once reserved not fall under the grant should the reser-

vation afterwards from any cause be removed, but it does not then become a source of indemnity for deficiencies in the place limits. Such deficiencies can only be supplied from lands within limits designated by the granting act or other law of Congress."

In Northern Lumber Co. v. O'Brien, 204 U. S. 190, the act was again under consideration. A claim to certain lands within the forty mile place limit prescribed by the grant made before the Northern Pacific R. R. Company had filed its map of definite location was found to be ineffectual although an order of the Land Department withdrawing it from the category of public lands had been predicated upon it. Under these conditions Mr. Justice Harlan speaking for the court said: "When the withdrawal order ceased to be in force, the lands so withdrawn did not pass under the later grant but became a part of the public domain, subject to be disposed of under the general land laws, and not to be claimed under any railroad grant."

If the filing of the swamp land list therefore constituted such a claim as to exclude the land from the operation of the railroad grant the cancelation or rejection of that list would not operate to extend the grant over the disputed tract. In other words, the grant does not purport to affect or attach to any subsequent status of the title. On the other hand if the mere filing of the swamp land list did not affect the title granted in presenti by the congressional
94 enactment the holding of the plaintiff and his grantors has been clearly adverse for sufficient length of time to ripen into a fee simple estate as against the defendants. Still further, under the authority of the Bardon case the indemnity selections could not be made from any land except what had always been exempt from any claim excluding it from the provisions of the act in the first place. In default of other legislation the grant embodied in the act of July 2, 1864, attached at the date of the filing of the plat of definite location or never. Whatever the general government afterwards might do towards extinguishing the claim of the state under its swamp land filing or the assertion of title by the plaintiff it would not inure to the benefit of the defendants in the matter of filing indemnity selections. The act evidently applied to virgin public domain and to no other, both in the original taking and in subsequent indemnity selections.

The plaintiff comes within the reason of the rule of Boe v. Arnold, 54 Or. 52, 102 Pac. 290, to the effect that one may enter upon public lands and by holding the same adversely to all persons except the government may acquire title thereto as against those other parties. Under the authorities quoted it is clear that the rights of the defendant under the act of July 2, 1864, never attached to this land, and that it had no right to include it subsequently in its indemnity selections. It is also equally plain that as between the parties to this suit the adverse possession of the plaintiff and his grantors for more than ten years has vested the title in the latter as against the company. The decree of the circuit court is affirmed.

95 Be it remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the Supreme Court room in the city of Salem, on the first Monday of October, 1916.

On this Tuesday the 19th day of December, 1916, the same being the twenty-second judicial day of said term, there were present: Frank A. Moore, Chief Justice; George H. Burnett, Associate Justice; Robert Eakin, Associate Justice; Thomas A. McBride, Associate Justice; Henry J. Bean, Associate Justice; Henry L. Benson, Associate Justice; Lawrence T. Harris, Associate Justice; J. C. Moreland, Clerk; whereupon, among others, the following proceedings were had:

E. W. McComas, Respondent,

vs.

Northern Pacific Railway Company, The Farmers' Loan and Trust Company, Trustee, and Other Persons Unknown to Plaintiff, Appellants.

In Bank Appeal From Umatilla.

This cause having, at Pendleton on the first day of November, 1916, been duly tried, argued and submitted to the court upon and concerning all the questions arising upon the transcript, record and evidence, and then reserved for further consideration. And the court having duly considered all the said questions, as well as the suggestions made by counsel in their argument and briefs, finds there is Not Error as alleged. It is therefore ordered, adjudged and decreed by the court that the decree of the court below in this cause rendered and entered be and the same is in all things affirmed.

And the court having considered the allegations of the parties and the stipulation of facts and testimony produced, together with the findings of fact, conclusions of law and decree of the court below in this cause found, made, rendered and entered finds that said findings of fact are correct and are sustained by the evidence, that the conclusions of law are correctly deduced therefrom,

96 and the decree correctly adjudicates the rights of the parties.

It is therefore ordered, adjudged and decreed by the court that the findings of fact, conclusions of law and decree of the court below in this cause so found, made, rendered and entered stand as the findings of fact, conclusions of law and decree of this court in this cause.

And said appellants the Northern Pacific Railway Company and The Farmers' Loan and Trust Company, having given an undertaking on appeal with the National Surety Company as their surety, it is further ordered that respondent recover off and from the appellants and their said surety on appeal his costs and disbursements in the court below to be there taxed, and his costs and disbursements in this court taxed at $49.00.

And it is further ordered that this cause be remanded to the court below from which this appeal was taken, with directions to enter a decree in accordance herewith.

97 In the Supreme Court of the State of Oregon.

In Banc.

E. W. McComas, Respondent,

vs.

Northern Pacific Railway Company, a Corporation, The Farmers' Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Appellants.

Petition for Rehearing.

Now come appellants, Northern Pacific Railway Company, a corporation, and The Farmers' Loan and Trust Company, a corporation, Trustee, and make this their petition for a rehearing of this cause.

Appellants seek a rehearing of this cause not for the purpose of renewing the arguments made in their briefs and oral arguments already considered by the court, but solely because the court in deciding the case proceeded under a misapprehension as to the state of the record. As we shall endeavor to point out, the premises upon which the court's conclusion are based find no support in the record, the court having inadvertently mistaken the facts as stipulated in the record by the parties.

The decision of the court is first that the Railway Company's mineral indemnity selections, not being made in the mineral
98 indemnity belt are invalid, and it is said that:

"The defendants say these selections have been approved and depend upon them for their title to the land;"

and second, that the adverse possession of plaintiff and his predecessors, being sufficient as against the Railway Company (Boe v. Arnold, 54 Or. 52), the Railway Company cannot complain.

The court is mistaken in assuming that the Railway Company's mineral indemnity selections have proceeded so far as to give this court any jurisdiction whatsoever over them. With one exception (one tract only having been repatented to the Railway Company), the selections are still before the Department, two of them having been approved by the local land office and two as yet having received no approval whatsoever. This being a suit to quiet title and not a possessory action, this court has no power to pass on the validity of these four selections. The question of whether or not they are valid because placed on lands located in place limits rather than indemnity limits is one for the Department. Thus far the Department has ruled that mineral losses may be made up in place

limits or elsewhere and that it is only general losses (i. e., losses resulting from the exception of place limit lands from the grant because of homestead or other claims) which must be made up in the indemnity limits. The mineral indemnity clause in the granting act is separate from that providing for general indemnity and the Department has taken the position that selections for mineral indemnity may be made within the place limits.

99 However this question may be decided, the point we desire to urge upon the court is that so far as the defendants' mineral indemnity selections here are concerned (excepting the one on which patent has been issued) this court is without jurisdiction. The Railway Company purposes to rely upon these mineral indemnity selections and it is relying upon them before the Land Department of the United States; and its right to have these selections considered by the Department cannot be prejudiced by the decision of this court.

Plaintiff's position, therefore, cannot be strengthened by any supposed weakness of the Railway Company's final claims to the lands. The suit is one brought by McComas to quiet his title and if he does not prove his title, obviously he is not entitled to a decree. This court's decision says that the defendants' attempt to secure the land must fail and therefore the plaintiff having possessed the land to the exclusion of defendants should succeed. But this court cannot so determine the rights of defendants for they are not before it for determination. The Land Department of the United States has already approved one of defendant's five mineral indemnity selections (although the land is within the place limits) and presumably will similarly dispose of the other four selections. Until the Department does so dispose of these four selections, this court cannot determine the question of whether they were properly made. The title to these lands is in the United States and jurisdiction over them is still in the Department.

This court has mistakenly supposed that the title to these lands has passed out of the United States and that the controversy is simply as to which of the parties is now the owner of the lands; and

100 applying the spirit of Boe v. Arnold, supra, has upheld plaintiff's prescriptive right. A reference to pages 14, 15, 16, 17, and 18 of the abstract of record will show that this assumption as to the issue before the court is erroneous. One of the tracts (northeast quarter of southwest quarter, section 7, township 5 south of range 30 east) has indeed been repatented and the conclusions of the court, erroneous though we think they may be, are applicable to it; but as to all of the rest of the land, the title is in the United States and this court is without power now to pass upon the title which, if the Department acts favorably on the mineral indemnity selections, the Railway Company will receive from the United States.

The result of the decision, therefore, is to permit McComas to take this land—not from the Railway Company but from the United States—by virtue of his occupancy for the ten year period. The decision seems to concede (page 3) that the State's swamp land list prevented these lands from going to the Railway Company in 1883 under the terms of the granting act; and, if so, they remained public

lands and are still (excepting the repatented tract) public lands. Boe against Arnold, therefore, is inapplicable. Plaintiff and defendant were not during the time of plaintiff's possession attempting to secure the title to the lands from the United States.

If defendants' pending efforts to secure the four tracts through mineral indemnity selections are left out of consideration, as we think they must be left out of consideration, plaintiff's suit to quiet title rests solely upon his possession of what concededly was and is public land. To give effect to that occupancy is not to up-
101 hold the spirit of Boe v. Arnold, but it is to take the title from the United States and give it to plaintiff; which under Gibson v. Choteau, 80 U. S. 92 (13 Wall. 92) and many later cases cannot be done.

Under the decisions of the Supreme Court of the United States, the conclusiveness of which the decision of this court (page 3) seems to recognize, this case ultimately must be determined against plaintiff. The suit is his and not that of the defendants and he asks for a confirmation of his alleged title. This title is based on adverse possession. The lands involved are public lands and there is not before the court any other question growing out of the application of the defendants to the Land Department of the United States for these lands. In this situation plaintiff's attempt to secure these public lands from the United States by adverse possession, although successful in this court, cannot succeed in the court which under the laws of the United States is empowered to determine finally the questions involved. And if rehearing be not granted here, the result will be to burden the parties with the expense of the proceedings necessary for a final review of the case; all of which, as defendants think certain, ultimately will fall upon plaintiff.

Respectfully submitted,

CAREY & CAREY AND
CHARLES A. HART,
Attorneys for Appellants.

102 STATE OF OREGON,
County of Marion, ss:

I, Charles A. Hart being duly sworn depose and say that I served the within petition for rehearing on Messrs. Raley & Raley attorneys for respondent in this cause by depositing in the United States mail postage prepaid at Portland, Oregon, addressed to said attorneys at Pendleton, Oregon, on the 8th day of January 1917 a copy of said petition certified to be a correct copy by me as attorney for appellant.

(S'd) CHARLES A. HART.

Subscribed and sworn to before me this 8th day of January 1917.

[SEAL.] J. C. MORELAND, *Clerk.*
By ARTHUR S. BENSON, *Deputy.*

[Endorsed:] Copy. No. —. In the Supreme Court of the State of Oregon. E. W. McComas, Respondent, vs. Northern Pacific Railway Company et al., Appellants. Petition for Rehearing. Filed Jan. 8, 1917. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. Carey & Kerr, and Charles A. Hart, Attorneys for Defendants.

103 In the Supreme Court of the State of Oregon. In Banc.

E. W. McComas, Respondent,

vs.

Northern Pacific Railway Company, a Corporation; The Farmers Loan & Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Appellants.

Petition for Rehearing.

Comes now the respondent, E. W. McComas, and makes this his petition for a rehearing of this cause and for a more definite decision and interpretation of the language used in the opinion filed herein, in this:

Upon page 3 of said opinion the following language is used:

"Conceding, as the precedent seemed to hold, that the filing of the land list by the State of Oregon constituted a claim within the meaning of the Railroad Grant excluded the land from its operation proves too much for defendant."

The opinion having decided the case upon other grounds, the language used does not decide, and perhaps does not intend to decide definitely as to whether or not such precedents do so hold, and if so, as to whether or not such precedents will be followed in this case.

And again, near the bottom of the last page of said opinion, the following language is used:

"Under the authorities quoted, it is clear that the rights of the defendant under the Act of July 2, 1864, never attached to this land."

104 & 105 It is not made clear whether or not the words "Attached to this land" refers to an attachment under the mineral selections, or whether it is intended to refer to the original grant of lands in place limits.

And in this connection, we again refer to the settled policy of the Interior Department itself, which holds that

"Until particular tracts of Government Land have been surveyed and segregated from the public domain by the approval of the lists and plats thereof by the Secretary of the Interior, the lands remain public lands and are subject to preemption and homestead entries."

In other words, the United States does not recognize any claim as existing upon these lands until the segregation by the Secretary of the Interior, and the State had no claim upon these lands at the time of

the taking effect of the grant of the Northern Pacific Railway upon the lands. We cite

Morrow vs. State of Oregon, 32 L. D., page 54.
State vs. Frakes, 33 L. D., page 101.
Morrow vs. Warner Val. Stock Co., 101 Pac. 171, in Column 2 at page 180.

Respectfully submitted,

RALEY & RALEY,
Attorneys for Respondent.

STATE OF OREGON,
County of Umatilla, ss:

I, the undersigned, one of the Attorneys for the Respondent, do hereby certify that I have prepared the foregoing copy of petition for rehearing and have carefully compared the same with the original thereof; that it is a correct transcript therefrom and of the whole thereof.

Dated at Pendleton, Oregon, this 9th day of January, 1917.

J. H. RALEY.

106 In the Supreme Court of the State of Oregon. In Banc.

E. W. McCOMAS, Respondent,

v.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; THE Farmers' Loan and Trust Company, a Corporation, Trustee, and Other Persons Unknown to Plaintiff, Appellants.

Appeal from Umatilla County.

Hon. Gilbert W. Phelps, Judge.

On Petition for Rehearing.

Affirmed December 19, 1916.

Raley & Raley, for respondent.
Charles A. Hart and Carey & Kerr, for appellants.

MOORE, *J.:*

Modified.

Filed Jan. 30, 1917. J. C. Moreland, Clerk of the Supreme Court.

107 MOORE, *J.:*

In a petition for a rehearing it is contended that the defendant, the Northern Pacific Railway Company, which will hereafter be

called the company, holds a legal title to only one of the disputed tracts of land, that the United States is vested with such title to the other parcels of the controverted real property, of which latter premises the state courts have no jurisdiction, and that this being so an error was committed in not reversing the decree. The transcript shows that lots 2 and 4 in section 5; lots 1 and 2, the north half of the northeast quarter, and the northeast quarter of the southwest quarter of section 7, in township 5 north of range 30 east of the Willamette Meridian, were selected November 23, 1872, as swamp lands by the State of Oregon, which on August 10, 1892, and March 15, 1895, executed deeds therefor to the plaintiff's grantors and predecessors. The company asserting a right to these lands by virtue of an act of Congress received from the United States patents for the northeast quarter of the southwest quarter of section 7, June 8, 1906; for lots 1 and 2 in that section, December 31, 1907; and for lot 2 in section 5, May 4, 1909. After this suit was commenced the company considering these tracts of land were excluded from the operation of its grant by reason of the state's definite location of swamp land selection, and assuming that the patents referred to were erroneously issued, executed to the United States, December 4, 1912, a deed for the real property last described, which deed was duly recorded in the proper county. Thereafter the company filed in the local land office at La Grande, Oregon, its mineral indemnity selection for these lands, and on May 25, 1914, pursuant to such choice, it received from the United States a second patent for the northeast quarter of the southwest quarter of section 7. The General Land Office rejected the state's selection of lot 4 in section 5, and the north half of the northeast quarter of section 7, for which
108 latter real property the company also filed mineral indemnity selections.

The former opinion in this cause proceeds upon the theory that the company was unquestionably vested with the naked legal title to the northeast quarter of the southwest quarter of section 7, for which it had received the second patent, but that its right to such land was barred by the adverse occupancy of the premises by the plaintiff and his grantors and predecessors. As to the other tracts for which patents had been received by the company, but which it had attempted to deed to the United States, the naked legal title might well be regarded as being held by the company, notwithstanding the signing and recording of its deed. Like any other contract a deed to be valid requires the aggregatio mentium of the grantor and the grantee. In the case before us there is no evidence tending to show that the United States ever accepted that deed, which evidently appears to have been signed and recorded by the company to circumvent the granting of a part of the relief prayed for in this suit. Section 4 of the Act of Congress of February 14, 1859, admitting this state into the Union contains a clause which reads: "Provided, that the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary dis-

posal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof." 11 U. S. Stat. 383. When the patents were thus issued the United States thereby made a primary disposal of the soil, and the title so transferred to the company made it no more immune from attack in the state courts than if such conveyance had been executed by a private party. No error was committed in determining that as to all the real property so patented the company held only the naked legal title, which was defeated by the adverse holding of the plaintiff and his grantors.

The state's selection as swamp land of lot 4 of section 5,
109 and the north half of the northeast quarter of section 7, was rejected by the General Land Office, and the company's selection thereof as mineral indemnity was approved by the local office. No patent for any part of this land has ever been granted, and the title thereto is in the United States. While the title so remains, a state court is powerless legally to interfere therewith. It should be the duty of such a tribunal, however, when it finds two parties who are seeking to obtain the title to government land, to protect the possession of him that apparently has the better right until the controversy can be adjudicated by the agencies appointed by the United States for that purpose. Kitcherside v. Myers, 10 Or. 21; Jackson v. Jackson, 17 Or. 110; 19 Pac. 847; Hindman v. Rizor, 21 Or. 112; 27 Pac. 13; Pacific Live Stock Co. v. Gentry, 38 Or. 275; 61 Pac. 422; 65 Pac. 547; Borman v. Blackmon, 60 Or. 304; 118 Pac. 848.

The decree will, therefore, be modified so as to enjoin the defendants, their agents, servants, etc., from interfering with or disturbing the plaintiff's possession of the real property last described until the question is determined in the manner suggested. With this alteration the former opinion is adhered to in all respects.

110 Be it remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the Supreme Court room in the city of Salem, on the first Monday of October, 1916.

On this Tuesday the 30th day of January, 1917, the same being the fortieth judicial day of said term, there were present:

Thomas A. McBride, Chief Justice; Henry J. Bean, Associate Justice; Henry L. Benson, Associate Justice; Lawrence T. Harris, Associate Justice; Frank A. Moore, Associate Justice; George H. Burnett, Associate Justice; Wallace McCamant, Associate Justice; J. C. Moreland, Clerk; whereupon, among others, the following proceedings were had:

E. W. McComas, Respondent,

vs.

Northern Pacific Railway Company, The Farmers Loan and Trust Company, Trustee, and Other Persons Unknown to Plaintiff, Appellants.

In Bank Appeal from Umatilla.

This cause having, at Pendleton, on the first day of November, 1916, been duly tried, argued and submitted to the court, and then reserved for further consideration, and the court having on the 19th day of December, 1916, rendered a decree herein, affirming the decree of the court below, and a petition for rehearing having been filed and duly considered by the court.

It is now here ordered, adjudged and decreed by the court that the decree of the court below be and the same is modified by enjoining the appellants, their agents, servants and employees from interfering with or disturbing the respondent's possession of the real property described in the proceedings herein until the question of the real ownership is determined by the tribunals of the United States, otherwise said decree as rendered on the 19th day of December, 1916, be and the same is in all things affirmed.

111 State of Oregon,
County of Marion, ss:

I, J. C. Moreland, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing copies of Complaint, Answer, Reply, Opinion, Findings of Fact and Conclusions of Law, Decree, Notice of Appeal and Undertaking on appeal, and the Printed Abstract, constituting the record on appeal to this court from the Circuit Court of the State of Oregon for Umatilla county, in the case of E. W. McComas, Plaintiff, vs. Northern Pacific Railway Co. et al., Defendants, and also the Opinion of this court, and the Decree entered thereon on the 19th of December, 1916, and the Petitions for Rehearing filed herein by both plaintiff and defendants, the opinion of this court on said petition and the order made January 30, 1917, overruling same, have been by me compared with the originals and that they are true and correct copies therefrom, and of the whole of each original, as the same appears of record and on file at my office and in my custody.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court of the State of Oregon at the City of Salem, Oregon, this 10th day of March, 1917.

[Seal Supreme Court, State of Oregon, 1859.]

J. C. MORELAND, *Clerk*,
By ARTHUR S. BENSON, *Deputy*.

Received —— —, ——.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oregon, Greeting:

Being informed that there is now pending before you a suit in which Northern Pacific Railway Company, The Farmers' Loan & Trust Company, Trustee, and other persons unknown to plaintiff, are appellants, and E. W. McComas is respondent, which suit was removed into the said Supreme Court by virtue of an appeal from the Circuit Court for Umatilla County, State of Oregon, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-sixth day of April, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 25,895. Supreme Court of the United States, No. 1065, October Term, 1916. Northern Pacific Railway Company vs. E. W. McComas. Writ of Certiorari. Filed May 8, 1917. J. C. Moreland, Clerk of the Supreme Court. By Arthur S. Benson, Deputy.

In the Supreme Court of the State of Oregon.

E. W. MCCOMAS, Respondent,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; THE Farmers' Loan and Trust Company, a Corporation, Trustee, Appellants, and Other Persons Unknown to Plaintiff, Defendants.

I, J. C. Moreland, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the transcript of the record of the proceedings in this court in the above entitled cause, heretofore certified

by me for filing in the Supreme Court of the United States, was correct and complete as the same then appeared in this court.

In pursuance of the command of the writ of certiorari issued out of the Supreme Court of the United States and directed to the Supreme Court of the State of Oregon, dated April 26, 1917, I now hereby certify that on the 8th day of May, 1917, there was filed in my office a stipulation in the above entitled cause in the following words, to wit:

(Endorsed:) "No. —. In the Supreme Court of the State of Oregon. E. W. McComas, Respondent vs. Northern Pacific Railway Company, a corporation, The Farmers Loan and Trust Company, a corporation, Trustee, Appellants, and Other Persons Unknown to Plaintiff, Defendants. Stipulation. Filed May 8, 1917, J. C. Moreland, Clerk of the Supreme Court, By Arthur S. Benson, Deputy."

"In the Supreme Court of the State of Oregon.

E. W. McComas, Respondent,

vs.

Northern Pacific Railway Company, a Corporation; The Farmers' Loan and Trust Company, a Corporation, Trustee, Appellants, and Other Persons Unknown to Plaintiff, Defendants.

Stipulation.

"It is hereby stipulated between Appellants, Northern Pacific Railway Company and The Farmers' Loan and Trust Company, Trustee, and Respondent, E. W. McComas, that the transcript already filed in the office of the Clerk of the Supreme Court of the United States with the petition for writ of certiorari be taken as a return to said writ, dated the 26th day of April, 1917.

"Dated this 4th day of May, 1917.

CHARLES H. CAREY,
JAMES B. KERR,
CHARLES A. HART,
Attorneys for Appellants.
JAMES H. RALEY,
J. R. RALEY,
Attorneys for Respondent."

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

Witness my official signature and the seal of said Supreme Court

of the State of Oregon at the City of Salem, in said State of Oregon this 8th day of May, 1917.

[Seal Supreme Court, State of Oregon, 1859.]

J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.
By ARTHUR S. BENSON, *Deputy.*

[Endorsed:] 1065/25,895. In the Supreme Court of the State of Oregon. E. W. McComas, Respondent, vs. Northern Pacific Railway Company, a corporation; The Farmers' Loan and Trust Company, a Corporation, Trustee, Appellants, and Other Persons Unknown to Plaintiff, Defendants. Certificate of Clerk.

[Endorsed:] File No. 25,895. Supreme Court U. S. October Term, 1916. Term No. 1065. Northern Pacific Railway Co., Petitioner, vs. E. W. McComas. Writ of Certiorari and return. Filed May 29th, 1917.

In

The Supreme Court

of the United States

October Term, 1916

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, and THE FARMERS' LOAN AND TRUST COMPANY, a corporation, as Trustee,

Petitioners,

vs.

E. W. McCOMAS,

Respondent.

Petition for Writ of Certiorari

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now come your petitioners, Northern Pacific Railway Company, a corporation, and The Farmers' Loan and Trust Company, a corporation, and make this their petition for a writ of *certiorari* to the Supreme Court of the State of Oregon and in support thereof respectfully say:

This suit originated in the Circuit Court of the State of Oregon for Umatilla County. Its object is to quiet title to certain lands located within the place limits of the grant to the Northern Pacific Railroad Company (Act of July 2, 1864, 13 Stats. at Large, 365.) There was a decree for plaintiff (respondent here) which was first affirmed and subsequently on rehearing modified by the Supreme Court of the State of Oregon; pursuant thereto a decree was rendered by the Supreme Court of Oregon on January 30, 1917. (Record, p. 110.) Said decree is final and the Supreme Court is the highest court of the State of Oregon in which a decision in the suit can be had.

The decision of the Supreme Court of the State of Oregon denies a title, right, and privilege granted your petitioners by the Act of Congress approved July 2, 1864, (13 Stats. at Large, 365) in this:

Although the lands in dispute are within the place limits of the grant made to the Northern Pacific Railroad Company, they were excepted from the grant because at the time of definite location of the railroad they were not free from "preemption or other claims or rights." At that time (June 29, 1883,) there was of record in the Land Department of the United States a claim to the lands filed November 23, 1872, by the State of Oregon, under the Swamp Land Acts of 1850 and 1860 (9 Stats. at Large, 519; 12 Stats. at Large, 3). (Record, p. 31.) Nevertheless the lands (with the exception of two

tracts) were patented to the Northern Pacific Railway Company, the successor of the grantee, which company assuming the patents to have been inadvertently issued reconveyed the lands to the United States after the beginning of this suit. (Record, pp. 20-23.) Under the provisions of Section 3 of the Granting Act (13 Stats. at Large, 365) the Railway Company filed mineral indemnity selections covering each tract; one of those has gone to patent and the others are *sub judice* in the Land Department of the United States. (Record, pp. 20-23.)

The decree of the Circuit Court denied that the swamp land claim of the State of Oregon was a "claim" sufficient under the granting act to except the lands from its operation, and held that they passed to the Railroad Company upon definite location in 1883; and the right of plaintiff (respondent here) to the lands was upheld because of subsequent adverse possession. (Record, pp. 15, 40.)

The decision of the Supreme Court of Oregon held that though the lands *were* excepted from the grant by the State swamp claim yet the legal title to the lands became vested by virtue of the patents and that the reconveyances by the Railway Company were ineffectual to revest the United States with the title since the record failed to show an acceptance of the deeds by the United States; and that this title was defeated by the adverse holding of respondent's grantors. (Record, p. 106.) In this the court erred since the lands were not patented at the time of the

adverse possession; all of the patents to the Railway Company having been issued less than ten years prior to the commencement of this suit. (Record, p. 33.)

These decisions incorrectly construe the Act of July 2, 1864, (13 Stats. at Large) and through such erroneous construction uphold the claim of respondent based solely on occupancy of public land and deprive petitioners of the right given by Section 3 of said Act to select for mineral losses lands within the place limits which clearly were public lands at the time of filing the selection lists.

Petitioners believe that these decisions of the Supreme Court of the State of Oregon and the decree entered pursuant thereto are erroneous and that this Honorable Court should require the cause to be certified to it for its review and determination in conformity with the provisions of the Act of Congress in such cases made and provided.

There is submitted herewith a copy of the entire record in the cause in the Supreme Court of the State of Oregon certified to be a correct copy by the clerk of said court; said copy is marked "Exhibit A" and it includes a transcript of all of the proceedings had in said cause both in the trial court and in the Supreme Court of Oregon.

Wherefore your petitioners respectfully pray that a writ of *certiorari* may be issued out of and under the seal of this court directed to the Supreme Court of the State of Oregon commanding the said

court to certify and send to this court on a day certain to be therein designated a full and complete transcript of the record of all proceedings of the said Supreme Court of the State of Oregon in the said cause therein entitled: *E. W. McComas, Respondent v. Northern Pacific Railway Company, a corporation, The Farmers' Loan and Trust Company, a corporation, Trustee, Appellants, and other persons unknown to plaintiff, Defendants,* to the end that said cause may be reviewed and determined by this court as provided by Section 237 of the Judicial Code of the United States as amended by the Act of Congress approved September 6, 1916; or that your petitioners may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said Act, and that the said decree entered as aforesaid in conformity with said decisions of the Supreme Court of the State of Oregon in said cause and every part thereof may be reversed by this Honorable Court.

And your petitioners will ever pray.

CHARLES H. CAREY,
JAMES B. KERR,
CHARLES A. HART,
Counsel.

State of Oregon, County of Multnomah, ss.

Charles A. Hart, being duly sworn, says: that he is one of the counsel for Northern Pacific Railway Company and The Farmers' Loan and Trust Company, petitioners; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

CHARLES A. HART.

Subscribed and sworn to before me this 20th day of March, 1917.

(Seal) OMAR C. SPENCER,
Notary Public for Oregon.

My commission expires October 19, 1919.

Brief in Support of Petition for Writ of Certiorari

STATEMENT OF THE CASE.

This is a suit to quiet title to certain lands in Umatilla County, Oregon, located within the place limits of the grant to the Northern Pacific Railroad Company (Act of July 2, 1864, 13 Stats. at Large, 365). The respondent McComas was plaintiff in the trial court. His claim to the lands was based upon the theory that they became vested in the Railroad Company at the time the railway was definitely located in 1883; and that his possession under color of title based upon a conveyance from the State of Oregon for ten years after 1892 gave him the undisputed right to the lands. (Record, pp. 31, 32.)

The defendants insisted that the lands were excluded from the grant of July 2, 1864, since at the time of definite location of the railway in 1883, there was of record a swamp land list filed by the State of Oregon, November 23, 1872, under the Swamp Land Acts of 1850 and 1860 (9 Stats. at Large, 519, 12 Stats. at Large, 3). (Record, pp. 31, 32.) With the exception of two of the tracts involved, the land was in fact patented to the Railway Company, successor of the Railroad Company, in 1906, 1907, and 1909, (Record, p. 33), but the Railway Company assuming that the patents had

been inadvertently issued reconveyed the lands to the United States after the beginning of this suit. (Record, pp. 20-23.) Thereafter under the mineral indemnity provisions of the Granting Act (13 Stats. at Large, 365) petitioner Railway Company filed selection lists covering the lands. One of these has gone to patent and the others are *sub judice* in the Land Department of the United States. The two tracts which were not patented have also been selected under the mineral indemnity section of the grant. The status of each of the tracts in dispute is as follows (Record, pp. 20-23):

Lot 2, Section 5, Township 5 North, Range 30 East,

Included in State's swamp land list of November 23, 1872, but claim never passed on by Department; conveyed by State to respondent's predecessor August 10, 1892; patented to Railway Company May 4, 1909; reconveyed by Railway Company to United States December 4, 1912; included in mineral indemnity selection list No. 107 filed January 17, 1913, and claim thus made not yet disposed of by Department.

Lot 4, Section 5, Township 5 North, Range 30 East,

Included in swamp land list filed by State of Oregon November 23, 1872, and conveyed by State to respondent's predecessor; swamp land claim of State thereafter rejected by the Department; included in mineral indemnity selection list No. 101 filed by Railway Company and approved October 11, 1912, but not yet patented.

North Half of Northwest Quarter of Section 7, Township 5 North, Range 30 East,

Included in swamp land list filed by State of Oregon in 1872 and conveyed by the State to respondent's predecessor August 10, 1892. Swamp land claim of the State of Oregon thereafter disallowed by the Department; included in mineral indemnity selection list No. 67, filed by Railway Company and approved July 23, 1908, but patent not yet issued.

North Half of Northeast Quarter of Section 7, Township 5 North, Range 30 East. (Also described as Lots 1 and 2.)

Included in swamp land list filed by the State of Oregon November 23, 1872, and conveyed by the State to respondent's predecessor August 10, 1892; swamp land claim never adjusted. Patented to Railway Company December 31, 1907; reconveyed by Railway Company to United States December 4, 1912, included in mineral indemnity selection list filed by Railway Company January 17, 1913. Claim based thereon not yet adjusted.

Northeast Quarter of Southwest Quarter of Section 7, Township 5 North, Range 30 East.

Included in swamp land list of the State of Oregon of November 23, 1872, and conveyed by the State to respondent's predecessor; claim of the State rejected March 15, 1895; patented to the Railway Company June 8, 1906; reconveyed by Railway Company to United States December 4, 1912, included in mineral indemnity selection list filed by Railway Company and approved January 17, 1913. Patent issued to the Railway Company upon the selection so made May 25, 1914.

Upon this record the question presented to the trial court was whether or not the lands were excepted from the operation of the railroad grant of July 2, 1864, because at the time the railroad was definitely located in 1883, there was of record against them the swamp land claim of the State of Oregon. If the State's swamp claim did so except them, they remained public lands at least to the time of the patents; and the possession of respondent's predecessors would be ineffective. Petitioners did not seek affirmative relief in the trial court except as to the one tract repatented upon the mineral indemnity selection lists; its claim as to the other lands being before the Department and not within the trial court's jurisdiction.

The trial court concluded that the State's swamp land list was not a "claim" sufficient to take the lands out of the operation of the grant at the time of the definite location in 1883. (Record, p. 15.) This resulted in the decision that from the time of definite location the lands were railroad property and subject to rights acquired by adverse possession; and a decree for plaintiff (respondent here) was entered. (Record, p. 40.)

The first decision of the Oregon Supreme Court conceding the error of this conclusion nevertheless affirmed the decree upon the following grounds: Assuming that the mineral indemnity selections of the Railway Company had gone to patent and that the claims of petitioners based upon such patents

were before the court, it held that under the Act of July 2, 1864, mineral losses could not be made up from lands in the place limits of the grant and therefore that the selections of the Railway Company created no rights; and that as between these claims and the adverse possession claim of respondent, the latter should prevail. (Record, p. 89.)

Upon an application for rehearing which explained the error in the assumption that petitioner's mineral indemnity selection rights were before the court for construction (Record, p. 97), the decree was modified so as to exclude the two tracts which were never patented and as to which there is pending in the Land Department unadjusted selection lists of the Railway Company; as to these tracts an injunction was allowed against interference with respondent's possessory rights until action by the Land Department. (Record, p. 106.) As to the remaining tracts (those which were patented and subsequently reconveyed to the United States) the trial court's decree was affirmed but on the ground that the patenting of the lands to the Railway Company conveyed the legal title which title was defeated by the adverse possession of respondent and his predecessors; and the reconveyances to the United States were said to have been ineffectual because the record failed to show that the United States had accepted the deeds. (Record, p. 106.)

The final decree entered pursuant to the second decision of the Oregon Supreme Court confirms

respondent's title to the tracts last referred to and denies the right of petitioner Northern Pacific Railway Company to acquire them under the mineral indemnity clause of the Act of July 2, 1864; and as to the other two tracts enjoins interference with the possession of respondent until the Land Department shall have acted upon the Railway Company's mineral indemnity claims. (Record, p. 110.)

ARGUMENT.

It is assumed that the relief here sought is not available to petitioners unless clearly and unmistakably rights granted by a law of the United States have been denied by the decision of the Oregon Supreme Court. We shall undertake, therefore, to point out the plain error of the decision and its denial of petitioners' rights under the Act of July 2, 1864.

The question upon which this case originally turned was whether or not the lands in dispute were excepted from the grant of July 2, 1864, because at the time the railway was definitely located there was of record in the Land Department the swamp land claim of the State of Oregon. The trial court decided that the State's swamp land list was not a "claim" under the terms of the Act and that the lands passed to the Northern Pacific Railroad Company whose rights were later divested by the adverse possession of respondent's grantors. (Record, p. 15.) The Supreme Court of the State although affirming the trial court's decree declined to follow the reasoning on which it was based and conceded that the swamp land claim of the State did operate to exclude the lands in dispute from the grant to the Railroad Company. (Record, p. 92.) On this question, therefore, we shall content ourselves with a reference merely to the decisions of this court establishing beyond question (as we believe) that a claim such as that which had been made to these

lands by the State of Oregon is a "claim" sufficient to prevent the grant from attaching at the time of definite location of the railway.

Whitney vs. Taylor, 158 U. S. 85, discusses the effect of an existing claim in the following language:

> "It was not the intention of Congress to open a controversy between the claimant and the Railroad Company as to the validitv of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the government and the claimant in respect to which the Railroad Company was not permitted to be heard."

Applying the rule thus stated this court held that applications to purchase lands as mineral (although the lands were not in fact classified as mineral) were "claims" preventing the grant from attaching; *Northern Pacific Railway Company vs. Sanders,* 166 U. S. 620. In *Northern Pacific Railway Company vs. Musser-Sauntry Company,* 168 U. S. 604, a withdrawal by the Department for the purpose of satisfying another grant was held to have the same effect. Similarly *Nelson vs. Northern Pacific Railway Co.,* 188 U. S. 108, and *Northern Pacific Railway Co. vs. Trodick,* 221 U. S. 208, held that not even a claim of record was necessary, if (the land being unsurveyed,) there was actual possession with bona fide intention to enter after survey.

See also *Northern Pacific Railway Co. vs. Wismer*, 230 Fed. 591, holding that the setting aside of certain lands by representatives of the Department to satisfy an agreement with the Spokane Indians removed the lands from those to which the grant attached.

The settled practice of the Land Department has been to treat as excluded from the grant all lands to which any claim existed at the time of definite location.

N. P. Rd. Co. vs. Evans, 7 Land Dec. 131.
N. P. Rd. Co. vs. Bowman, 7 Land Dec. 238.
N. P. Rd. Co. vs. Potter, 11 Land Dec. 531.

Chicago, Milwaukee & St. Paul Railway Co. vs. U. S., 218 U. S. 233, which considers the effect upon the grant to the McGregor and Western Railroad Company of a swamp land claim of the State of Iowa is distinguishable because of the difference in the language of the granting acts. The grant to the McGregor and Western Company excluded from its operation "all lands heretofore reserved to the United States by competent authority," whereas the Northern Pacific grant included only lands which were free from "preemption or other claims or rights."

It is clear that any claim made in good faith and undisposed of by the Land Department at the time of definite location excepted the lands from the grant of July 2, 1864. Under the cases cited the selection list of the State of Oregon not yet

passed upon by the Land Department when the railroad was definitely located was such a claim, so that the lands in dispute did not pass to the Northern Pacific Company when it filed its map of definite location on June 29, 1883.

The decision of the Oregon Supreme Court conceded that the State's claim had the effect of excluding the lands from those granted to the Railroad Company. (Record, p. 92.) Nevertheless the court held that the possession by respondent's grantor for the period provided by the State statute entitled respondent to the lands (excluding the two tracts which were never patented) because, as it was said, the lands were in fact patented to the Railroad Company; and the legal title having been conveyed thereby that title could be defeated and was defeated by the adverse occupancy of the lands. The court said in its opinion on application for rehearing (Record, p. 108):

> "When the patents were thus issued the United States thereby made a primary disposal of the soil, and the title so transferred to the company made it no more immune from attack in the State courts than if such conveyance had been executed by a private party. No error was committed in determining that as to all the real property so patented the company held only the naked legal title, which was defeated by the adverse holding of the plaintiff and his grantors."

The reconveyances by the Railway Company to the United States were held not to have affected the situation because the record did not show an acceptance by the United States of the deeds of reconveyance. (Record, p. 108.)

The plain error of this decision is its assumption that the lands were patented to the Northern Pacific Railroad Company prior to the time of the adverse possession, and that during the statutory period when respondent's grantors were occupying the land the legal title was in the Railroad Company. In point of fact the possession relied on began prior to 1892 and the patents were issued one in 1906, one in 1907, and one in 1909; in each instance less than ten years (the statutory period in Oregon) prior to the beginning of this suit. (Record, p. 33.)

If lands patented in error are no longer public lands and are possible of acquisition from the time of the patent by innocent purchasers (*U. S. vs. Winona & St. Peter R. Co.*, 165 U. S. 463), no retroactive effect can be given the patents and undeniably the lands remained public lands up to the time of the patent.

On the face of the record the legal title to the patented tracts was never in the Railway Company or its predecessor, Northern Pacific Railroad Company, sufficiently long to enable respondent or its grantors to defeat it by adverse possession. At the time of the possession upon which respondent's

case is founded—from 1892 to 1902—(Record, p. 32) the lands were unpatented public lands excluded from the operation of the railway grant because of the swamp claim of the State; and no legal title to any of the tracts was conveyed to the Railway Company by the United States until the year 1906. (Record, p. 33.) This suit was commenced September 25, 1912. (Record, p. 49.)

This decision, therefore, recognizes and affirms alleged rights based solely on the possession for the period provided by State law, of public lands; and if not set aside its effect will be to deny the rights now being asserted by petitioners in the Land Department to obtain the land under the mineral indemnity clause of the Act of July 2, 1864.

Except as to the one tract which has been repatented to the Railway Company upon its mineral indemnity selection, petitioners do not seek affirmative relief in this suit: the claim of the Railway Company to the lands (with the one exception) being *sub judice* in the Land Department. The basis of its claim to all the lands, however, is the same; treating the lands as public lands it filed with the Land Department the mineral indemnity selections authorized by the granting act.

In its first opinion the Supreme Court of Oregon held that these mineral indemnity selections of the Railway Company were ineffectual and that

selections to take the place of lands lost to the grant because mineral in character could be made only within the ten mile limit beyond the place limits. (Record, p. 89.) Upon an application for rehearing (Record, p. 97) which explained that this question was not before the court but was *sub judice* in the Land Department a different basis was assigned by the State Supreme Court for affirmance of the decree in favor of respondent. (Record, p. 106.)

The question of whether or not the Railway Company's indemnity selections have been made properly is perhaps not open to discussion here. It is proper to say, however, that the opinion of the Oregon Supreme Court limiting the mineral indemnity selection right given by the granting act to the ten mile deficiency limits is contrary to the settled construction of the Act by the Land Department. See opinions Attorney General Wickersham, 41 Land Dec. 571, and Assistant Attorney General Cobb, 41 Land Dec. 576, and unreported decision of Secretary of Interior September 18, 1913, in the case of *Margaret T. Souders vs. Northern Pacific Railway Company.*

The final decision of the Supreme Court of Oregon in this case awards the land in dispute to respondent notwithstanding the fact that the land was public land and not subject to rights based

upon the possession of his grantors. The decision denies to petitioners the rights given by the Act of July 2, 1864; it defeats the title to the northeast quarter of the southwest quarter of Section 7, Township 5 North of Range 30 East, which title is based upon patent issued May 25, 1914, upon mineral indemnity selection made under authority of the mineral indemnity clause of the granting act. The decision further denies the right of petitioners to secure the two tracts (Lot 2, Section 5, and north half of northwest quarter, or lots 1 and 2, of Section 7, Township 5 North of Range 30 East) which right is now being asserted through selection lists pending in the Land Department under the authority of the mineral indemnity clause of the granting act.

Clearly, therefore, the decision of the Oregon Supreme Court is erroneous and if unreversed it will deny to petitioners rights given by an Act of Congress, to-wit: the Act of July 2, 1864.

CHARLES H. CAREY,
JAMES B. KERR,
CHARLES A. HART,
Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 172.

NORTHERN PACIFIC RAILWAY COMPANY AND THE FARMERS LOAN AND TRUST COMPANY, TRUSTEE, PETITIONERS,

vs.

E. W. McCOMAS.

PETITIONERS' BRIEF.

Statement.

This is a writ of certiorari to review a decree of the Supreme Court of Oregon, affirming a decree of the Circuit Court for Umatilla County, in that State, quieting in the respondent, as against the petitioners, the title to five tracts of land in that county. All of these tracts are parts of odd-numbered sections within the place limits of the grant of lands made by the third section of the act of Congress of July 2, 1864, to the Northern Pacific Railroad Company, the predecessor in interest of the petitioner, Northern Pacific Railway Company (13 Stat., 365). The following are the facts out of which the question arises:

Previous to November 23, 1872, the lands in question were public lands. On that date, the State of Oregon claimed them under the Swamp Land Act of September 28, 1850 (9 Stat., 519), as extended and applied to the State of Oregon by the act of March 12, 1860 (12 Stat., 3), and this claim was pending June 29, 1883, when the Railroad Company filed its map of definite location (R., 16). Thereafter the State con-

veyed its supposed interest to the respondent's predecessors in interest, from whom, by mesne conveyances, he derived the claim of right under which he entered upon the lands. The State's claim, as to three of the tracts, has since been rejected by the Land Department; as to the remaining two it is still unadjusted (R., 9-12). Between 1906 and 1909 three of the five tracts were patented to the Northern Pacific Railway Company on the theory that, as they were parts of odd-numbered sections within the place limits of its grant, they belonged to that company; the remaining two have never been patented, but the Railway Company has selected and claimed both of them in lieu of other lands excepted from its grant on account of their mineral character.

September 25, 1912, respondent brought this action to quiet title, claiming to have been in possession "for more than ten years prior to the commencement of this suit adversely to defendants herein and all the world" (R., 2, 26). The Farmers Loan and Trust Company, as trustee under one of the Northern Pacific mortgages, was joined as defendant. December 4, 1912, the Northern Pacific Railway Company, believing that the patents to the three tracts had been issued inadvertently, and through failure to observe that the State's "claim" to them was pending on the date of definite location, reconveyed these three tracts to the United States, selecting them thereafter, however, in lieu of other lands excepted from its grant on account of their mineral character. May 25, 1914, one of the three tracts thus reconveyed was again patented to the Railway Company, this time under the mineral indemnity selection, and this patent the Railway Company now holds. The title to the other two tracts thus reconveyed still remains in the United States. The following history of the title to each of the five tracts in dispute* is given for convenient reference (R., 9-12).

*Other tracts were described and their title was put in issue by the complaint; but the parties, by stipulation, eliminated all dispute except as to these five tracts (R., 9-12).

1. *Lot* 2, *Section* 5, *Township* 5 *North, Range* 30 *East,* included in State's swamp land list of November 23, 1872, but claim never passed on by Department; conveyed by State to respondent's predecessor August 10, 1892; patented to Railway Company May 4, 1909; reconveyed by Railway Company to United States December 4, 1912; included in mineral indemnity selection list No. 107, filed January 17, 1913, and claim thus made not yet disposed of by Department.

2. *Lot* 4, *Section* 5, *Township* 5 *North, Range* 30 *East,* included in swamp land list filed by State of Oregon November 23, 1872, and conveyed by State to respondent's predecessor; swamp land claim of State thereafter rejected by the Department; included in mineral indemnity selection list No. 101 filed by Railway Company and approved October 11, 1912, but not yet patented.

3. *North Half of Northwest Quarter of Section* 7, *Township* 5 *North, Range* 30 *East,* included in swamp land list filed by State of Oregon in 1872 and conveyed by the State to respondent's predecessor August 10, 1892. Swamp land claim of the State of Oregon thereafter disallowed by the Department; included in mineral indemnity selection list No. 67 filed by Railway Company and approved July 23, 1908, but patent not yet issued.

4. *North Half of Northeast Quarter of Section* 7, *Township* 5 *North, Range* 30 *East.* (Also described as Lots 1 and 2.) Included in swamp land list filed by the State of Oregon November 23, 1872, and conveyed by the State to respondent's predecessor August 10, 1892; swamp land claim never adjusted. Patented to Railway Company December 31, 1907; reconveyed by Railway Company to United States December 4, 1912, included in mineral indemnity selection

list filed by Railway Company January 17, 1913. Claim based thereon not yet adjusted.

5. *Northeast Quarter of Southwest Quarter of Section* 7, *Township* 5 *North, Range* 30 *East,* included in swamp land list of the State of Oregon of November 23, 1872, and conveyed by the State to respondent's predecessor; claim of the State rejected March 15, 1895; patented to the Railway Company June 8, 1906; reconveyed by Railway Company to United States December 4, 1912, included in mineral indemnity selection list filed by Railway Company and approved January 17, 1913. Patent issued to the Railway Company upon the selection so made May 25, 1914.

In the trial court the respondent contended, and the court held (R., 34-36), that the State's swamp-land claim did not except the lands from the grant to the Northern Pacific Company; that title therefore vested in that company June 29, 1883, when map of definite location was filed; and that as respondent had occupied them for more than ten years previous to the commencement of the action he acquired title to them by adverse possession under the Oregon Statute (Lord's Oregon Laws, sec. 4).

On appeal the Supreme Court of Oregon, while conceding apparently that the trial court was wrong in deciding that the swamp-land selection was not a "claim," and in deciding that title had vested in the Railway Company on filing map of definite location, nevertheless affirmed the decree upon the ground that the mineral indemnity selections gave to the Railway Company no rights, and that, as between it and the respondent, the latter's adverse possession for more than ten years had vested title in him (R., 46-48).

On petition for rehearing the Supreme Court filed a second opinion (R., 54-56), modifying the decree so as to exclude the two tracts never patented, and allowing as to them an in-

junction against interference with respondent's possessory rights until action by the Land Department. As to the remaining tracts which had been patented and reconveyed to the United States, the decree was affirmed on the ground that the patents conveyed the legal title; that this title was lost to respondent as a result of his adverse possession and that of his predecessors; and that the reconveyances to the United States were ineffectual because it had not been shown that the United States had accepted the deeds. Both decisions are reported in 82 Oregon at page 639.

Thereupon this writ of certiorari was asked and allowed.

Assignment of Error.

The court erred in holding that it had jurisdiction to determine the title to the lands in question when it appeared that that title was in the United States.

ARGUMENT.

The State's swamp-land selection excepted the lands in question from the grant to the Northern Pacific Railroad Company. No principle of land-grant law is better settled than this. *Whitney vs. Taylor,* 158 U. S., 85; *Northern Pacific Railroad Company vs. Sanders,* 166 U. S., 620; *Northern Pacific Railroad Company vs. Musser-Sauntry Company,* 168 U. S., 604; *Nelson vs. Northern Pacific Railway Co.,* 188 U. S., 108; *Northern Pacific Railway Co. vs. Trodick,* 221 U. S., 208.

How slight a claim will operate so to except lands is strikingly shown in *Northern Pacific Railway Company vs. Wismer,* 230 Fed., 591, affirmed by this court under the same title in 246 U. S., 283.

And it is to be observed that in applying this principle, the question whether the "claim" was or was not valid is immaterial. As said in *Whitney vs. Taylor, supra:*

> "It was not the intention of Congress to open a controversy between the claimant and the Railroad Company as to the validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the Government and the claimant in respect to which the Railroad Company was not permitted to be heard."

The proposition that the Northern Pacific Company took title on filing its map of definite location in 1883, on which the trial court rested its decision in respondent's favor, is, therefore, clearly erroneous, and apparently the Supreme Court of Oregon concedes it to be so. It concedes, moreover, that as to the two tracts which were never patented, "a State court is powerless legally to interfere therewith" (R., 56), although even as to these two tracts it enjoins the petitioners from interfering with respondent's possession. But it goes on to hold that as to the three remaining tracts, the naked legal title was undeniably in the Northern Pacific Company at one time, by virtue of the patents actually, though erroneously, issued to that company; that the title thus held could not be surrendered to the United States, from which it was erroneously acquired, without an *aggregatio mentium* between it and the United States; and that as no such meeting of the minds had been shown, the legal title must be regarded as being in the Northern Pacific Company up to the time when it was lost to the respondent by his adverse possession. As to this, it is to be observed:

1. Even on this theory, the decision is clearly erroneous. If the title which the respondent acquired by prescription was that naked legal title which had vested in the Railway Company by the erroneous issue of the patents, it began only

with the date of those patents. The respondent certainly cannot be said to have held adversely to the Railway Company until its naked legal title began. The earliest of the three patents was dated June 8, 1906. The other two were dated December 31, 1907, and May 4, 1909 (R., 9-12). Adverse possession for a period of ten years is required under the Oregon statute before title is acquired by prescription (Lord's Oregon Laws, sec. 4), and, therefore, it is obvious that respondent had acquired no such title to any of the tracts on September 25, 1912, when his action was begun (R., 26), or even on April 7, 1916, when the decree was entered (R., 23).

2. It is, however, erroneous to say that anything was wanting to the complete revesting in the United States of the titles thus erroneously issued. That the Government accepted the title thus reconveyed is sufficiently evidenced by its attitude after the reconveyance, for it is clear that it claimed complete dominion over the lands, received and approved mineral indemnity selections covering them (R., 9-12), and actually reissued its patent to a portion of them (R., 11).

The situation therefore is that the courts of Oregon have assumed jurisdiction to determine rights in five tracts of land, the title to four of which was *sub judice* in the Land Department of the United States (where it still is) when the decree was rendered, and the title to the fifth of which, though declared by the court to be in the respondent as the result of his ten years' adverse possession, was *sub judice* in that Department until May 25, 1914 (R., 11); that is to say, until less than two years before the decree was rendered. Over lands of which the title is in this condition, it is very clear that the courts have no jurisdiction. *Humbird vs. Avery*, 195 U. S., 480, 502.

The question considered by the Supreme Court of Oregon in its first decision as to whether the Northern Pacific Company could lawfully acquire any title to the lands under its mineral indemnity selection, we purposely refrain from discussing, because it is not in issue here. The court's opinion on this point we conceive to be clearly wrong; but, whether right or wrong, it is, at all events, immaterial to the question here presented. The Northern Pacific Railway Company, like any citizen of the United States, has a right *to present its claim* to lands of which the title stands in the United States, and to have its claim considered by the Department whose duty it is in the first instance to consider such claims. If its claim is groundless, presumably the Department will reject it; or, even if it makes a mistake of law and allows it, the courts will correct the mistake in a proper proceeding, and declare the title erroneously given to be held in trust for the rightful claimant. In the case of the tract repatented to the Railway Company under its mineral indemnity selection, for instance, the respondent has a clear remedy if, in fact, that patent ought to have been issued to him. But he cannot blow hot and cold; he cannot deny that the Railway Company ever had any right whatsoever in the lands, and yet acquire a prescriptive title to them under it.

CHARLES W. BUNN.
CHARLES DONNELLY.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 172.

NORTHERN PACIFIC RAILWAY COMPANY AND THE FARMERS LOAN AND TRUST COMPANY, TRUSTEE, PETITIONERS,

vs.

E. W. McCOMAS.

BRIEF FOR RESPONDENT.

Reduced to its final analysis, the single question in this case, as presented by the writ of certiorari, is as to whether the Supreme Court of the State of Oregon had jurisdiction to consider and adjudicate the questions arising therein.

This question must be determined upon the facts as found by the trial court and the law applicable thereto.

The lands lying in Oregon, it must be presumed that the Oregon courts had jurisdiction, under the general proposition that the several States of the Union possess the power to

regulate the tenure of real property within their respective limits, the modes of its acquisition and transfer, etc. A very learned discussion of this question is contained in the decision of this court, delivered by Mr. Justice Field, in *United States vs. Fox,* 94 U. S., 315, 320, as follows:

> "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or other mode, is exclusively subject to the government within whose jurisdiction the property is situated. *McCormick vs. Sullivant,* 10 Wheat., 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the State."

The Facts.

The pertinent and essential facts necessary for a correct understanding of the questions involved are contained in paragraphs VI, XI, and XIV of the Findings of Fact, (R. 37, 38) as follows:

VI.

> "That the lands remaining in controversy and involved in this suit are lots 2 and 4 of section 5, and the north half of the northeast quarter, and lots 1 and

2, and the northeast quarter of the southwest quarter of section 7, township 5 north, of range 30 east, W. M."

XI.

"That the plaintiff and his grantors and predecessors in interest have been in the actual possession of the lands in controversy, and each and every part thereof, under a claim of right, title and interest and under color of title thereto, by deeds from the State of Oregon bearing dates, respectively, of August 10, 1892, and of March 15, 1895, claiming and holding the same adversely to the defendants and to all the world for long prior to and ever since the 15th day of March, 1895, and are now so in possession and so holding and claiming the lands in controversy, and each and every part thereof, by color of title as aforesaid."

XIV.

"That on the 31st day of December, 1907, the United States issued its patent to the defendant for lots 1 and 2 of section 7, under the General Granting Act of 1864, for place lands, and on the 9th day of June, 1906, the United States issued its patent to the northeast quarter of the southwest quarter of said section 7 as place lands under the General Granting Act of 1864, and on May 4, 1909, the United States issued to the defendant its patent for lot 2 as place lands under the General Granting Act of 1864, and that the defendant received and accepted such patents from the United States so conveying said lands as lands in the place limits under said grant."

It will be observed from the foregoing that when this suit was brought, on September 25, 1912, four of the five tracts in controversy had been patented to the Northern Pacific Railway Company and that the legal title to those four tracts was then in said company.

The Law Applicable.

The suit was apparently brought under section 516 of Bellringer & Cotton's Compiled Statutes of Oregon, usually cited as "B. & C. Comp.," which provides as follows:

> "Any person claiming an interest or estate in real estate not in the actual possession of another may maintain a suit in equity against another who claims an interest or estate therein adverse to him, for the purpose of determining such conflicting or adverse claims, interests, or estates."

This statute has been under consideration many times in the Supreme Court of the State, and the decisions thereon have been entirely harmonious and uniform. Only a few of them will be referred to.

In *Ladd vs. Mills,* 44 Or., 224, 226, the court, having reference to this statute, said:

> "Under this provision, it is not necessary that the plaintiff have the legal title before he can maintain a suit to determine an adverse claim to real estate. If he has any substantial interest in or claim to the property, and another asserts an estate or interest therein adverse to him, he is entitled to proceed under the statute."

This decision was approved and followed in the following, and many other subsequent cases in that court:

Holmes vs. Walford, 47 Or., 93, 99.

Savage vs. Savage, 51 Or., 169, 170.

Kieffer vs. Victor Land Company, 53 Or., 174, 178; and

Boe vs. Arnold, 54 Or., 52, in which a very thorough and complete discussion of the question was made, and the conclusion reached that—

> "One claiming title to land by adverse possession for a period of 10 years as against all persons, but

> recognizing the superior title of the United States Government, may assert such adverse possession as against any person claiming to be the owner under a prior grant."

As the court points out in its decision in the case last cited, an identical view of similar statutes has been taken by the highest courts of many of the States, citing numerous authorities.

A few additional authorities under like statutes of other States will be cited.

In *Pennie vs. Hildreth,* 81 Cal., 127, 130, under a provision of law quite similar to the Oregon statute, the claim was made that, in order to bring and prosecute a suit to quiet title, the plaintiff must be possessed of the legal title to the land involved, but the court answered that claim, saying:

> "If it be conceded that, in order to maintain an action of this kind, the party must have title in the property, the argument would have much force. But we do not understand this to be the law. * * * It is clearly not necessary that he have title to the property. If he has the right to possession, and another is claiming an estate or interest adverse to such right, he may maintain the action."

The same rule is applied by the Supreme Court of Iowa.

Laverty vs. Sexton & Son, 41 Iowa, 435.

Iowa Railroad Land Co. vs. Blumer, 206 U. S., 482, which will be more particularly referred to later on in this brief.

A like rule obtains in Arizona.

Ely vs. New Mexico, &c., Railroad Company, 129 U. S., 291, 294, and cases cited.

So also in Nebraska: *Arndt vs. Griggs,* 134 U. S., 316, 319, *et seq.,* in which the opinion was delivered by Mr. Justice Brewer, in the course of which he quoted with approval

from *Castrique vs. Imrie,* L. R., 4 H. L., 414, 419 (Mr. Justice Blackburn), as follows:

> "We think the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the court sits; and, secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, its adjudication is conclusive upon all the world."

The law of Nebraska under consideration in the case in 134 U. S., was Sec. 57, Chap. 73, Compiled Statutes, 1885, p. 183, which provided as follows;

> "An action may be brought and prosecuted to a final decree, judgment or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons, who claim an adverse interest therein, for the purpose of determining such estate, or interest, and quieting the title to said real estate."

The learned justice, after a luminous discussion of the authorities, among other things said:

> "Section 57, enlarging as it does the class of cases in which relief was formerly afforded by a court of equity in quieting the title to real property, has been sustained by this court, and held applicable to suits in the Federal court. *Holland vs. Challen,* 110 U. S., 15."

Two cases from Kansas are illustrative of the extent of the rule in that State. Many others might be cited, but these two are believed sufficient for present purposes, to wit:

In *Giltenan vs. Lemert,* 13 Kansas, 355, 358, the court said:

> "A party in the quiet, peaceable, and rightful possession of real estate, claiming title thereto, has such an interest therein, although his title may be ever-

so defective, that he may quiet his title and possession as against any adverse claimant whose title is weaker than his, or who has no title at all."

"It is a maxim that the party in possession is presumed to have a valid title." "It is *prima facie* evidence of seisin in fee." "Quiet and exclusive possession of real estate gives the party holding the same a right against any person who cannot establish a title." "This is the general rule, in respect of which there is no exception." Tyler, Ejectment, pp. 70-72.

In *Brenner vs. Bigelow,* 8 Kansas, 332, the same doctrine is announced, and it was further held (335) that

> "In an action to quiet title where it is shown that the plaintiff is in the actual possession of the property in controversy, the defendant cannot defeat the plaintiff's action except by showing a paramount right in himself. He cannot defeat such action by showing a paramount right in some other person, even if such other person should be a co-defendant."

Coming back now to the case of *Iowa Railroad Land Co. vs. Blumer,* 206 U. S., 482, the opinion in which was delivered by Mr. Justice Day, it will be noted that that case is very much like the one at bar, the third paragraph of the syllabus being as follows:

> "Although one who in good faith enters and occupies lands within the place limits of a railway grant *in præsenti* may not obtain any adverse title against the government, if, as in this case, his possession is open, notorious, continuous and adverse, it may, if the railway company fails to assert its rights, ripen into full title as against the latter, notwithstanding the entry in the Land Office was cancelled without notice as having been improperly made and allowed."

In that case one John Carraher had made an application to make a timber culture entry upon a tract of land within the place limits of the grant to the State of Iowa under the act of Congress of May 15, 1856, for railroad pur-

poses, and his application had been denied by the Commissioner of the General Land Office and the Secretary of the Interior; but pending final decisions on that application, he had made a subsequent application under the same law which was allowed by the local land officers. That entry was also cancelled by the Secretary of the Interior in his decision rejecting the prior application, but Carraher never received notice of such cancellation, and, under advice of his attorney, had remained on the land and had fully complied with the timber culture law for a period sufficient to entitle him to a patent, provided the land had been subject to such an entry. Carraher died, and his successor in interest, one Blumer, brought suit in the proper Iowa court to have title to the tract in controversy quieted in him as against the Iowa Railroad Land Company, as successor in interest of the Dubuque & Pacific Railroad Company, to whom the State had conferred the benefits arising under said grant to it of May 15, 1856. Blumer prevailed in the Iowa courts, and, on error, this court also sustained his claim. In the opinion (pp. 495-496), Mr. Justice Day said:

> "The Supreme Court of Iowa held that there was nothing in these facts to show that Carraher was not acting in good faith and with the belief that he would acquire title under the last entry under the Timber Culture Act, and we are not prepared to disturb this holding.
>
> "After 1891, as we have seen, the railway company was in position to have ousted him from the premises and asserted its superior title and right. It did not attempt to do this, and so far as the record discloses made no objections to Carraher planting and cultivating the trees required by the act of Congress to perfect his title under the second application. His possession was certainly open, notorious, continuous and adverse, and unless he was acting in bad faith, was such as would ripen into full title as against the railway company, it failing to assert its rights within the period of the Statute of Limitations. While until the time had run required by the Timber Culture

> Act, Carraher would have been in no position to claim title as against the government, he was occupying a hostile attitude toward the railway company, and, while recognizing title in the United States, he expected to acquire title from it, had excluded all others from the use and occupation of the land and held under no other title. The Supreme Court of Iowa has held that under such circumstances the statute of limitations of Iowa would run in his favor as against the railroad company, and we find no reason to disturb that conclusion. And for more than ten years that company was in such position under its grant that it might have maintained an action in ejectment, and asserted its title to the premises as against Carraher."

The particular pertinence of the decision just referred to to this case is, that therein it was expressly held that under the Iowa law, an action would lie to quiet title in a plaintiff who did not have any legal title, no title at all, in fact, save that of possession, and that the paramount title to the land in controversy was in the United States, from whom the plaintiff expected to secure a title. In the case at bar, the plaintiff, while not having a legal title to the lands in controversy, as he supposed he had, nevertheless, did have a deed or deeds for the property from the State of Oregon which was claiming the land as having inured to it under the swamp land grant of 1850 and 1860. He and his predecessor from whom he purchased had been in the open, notorious, exclusive and adverse possession of the land, as the findings show, ever since the 15th day of March, 1895, something over 17 years, when the suit was brought. While, of course, he was not expressly claiming a right under any of the public land laws of the United States, he was, nevertheless, claiming the land, was in complete and exclusive possession of it, and necessarily, had it ever been determined judicially that his title under the deeds from the State of Oregon would fail, he would doubtless then follow up his rights to the land and secure title from the United

States under any of the public land laws that might be applicable.

The same principles were applied by this court, speaking by Mr. Chief Justice White, in *Missouri Valley Land Co. vs. Wiese,* 208 U. S., 234, 249. In that case the land in controversy had been granted to the Sioux City and Pacific Railroad Company, the predecessor of the appellant, defendant below, under the acts of Congress of July 1, 1862, and July 2, 1864, being within the place limits of said grants, and was, after certain proceedings in the land department not necessary to be here mentioned, patented to the company. The Union Pacific Railroad Company, claiming to be the owner of the land in controversy, under its grant made by the same acts of Congress, sold the land to one Japp, and in 1887, conveyed it to him by warranty deed, who subsequently conveyed it to the defendant in error, Wiese. It having been determined in the land department that the land never was the property of the Union Pacific Company, but belonged to the Sioux City and Pacific Company, it was held that the sale of the land to Japp by the former company was of no effect, and that, therefore, he was not entitled to the benefits of section 5 of the act of March 3, 1887, as a purchaser from said company. Japp and his successor, Weise, however, remained on the land, and the suit was brought by him to quiet his title thereto. It was held, among other things, that the title of the railroad company became complete upon filing its map of definite location, prior to 1870 (the exact date not being stated in the opinion); and that Wiese could maintain a suit to quiet his title under the laws of Nebraska where the land was situated. In passing upon the question, the Chief Justice said:

> "That the entry and holding of the land by Japp, the grantor of Wiese, under the purchase by Japp in 1882, and the continued possession by Wiese after he acquired the land from Japp, should be deemed to have been adverse to the title and possession of the

> Sioux City Company, if the possession by Japp was not that of a co-tenant, and such possession was unaffected by the proceedings had in the land office subsequent to 1882, is not questioned. We are clearly of opinion that the possession of Japp and his grantee was adverse in the strictest sense of the term, and the acts of Wiese in seeking to acquire title from the United States under the act of 1887, with the view of removing a cloud upon his title, was not an act of recognition or acknowledgement of a superior title, either in the United States or in the Sioux City Company, operating to interrupt the continuity of his adverse possession, and in any event cannot be held to have destroyed a title which had already become perfect by the expiration of the statutory period in Nebraska for acquiring the legal title to land by adverse possession."

For the foregoing reasons, and in the light of the authorities referred to, there can be no valid claim that the suit as originally brought was not in proper form and was not legal under the laws of Oregon, especially as to four of the five tracts in controversy, to which the Northern Pacific Company then had the legal title by patents; and that, especially as to one of the tracts, which, after reconveyance to the United States, had been again patented to the company, when the decree below was rendered, the action would lie.

The contention of petitioner that the adverse possession of McComas, which began in 1895, would not run against the company, which did not receive patents for the land until June 8, 1906, December 31, 1907, and May 4, 1909, respectively, periods less than ten years in extent prior to the bringing of this action, on September 25, 1912, is without force, and is answered by the decision of this court in *Iowa Railroad Land Company vs. Blumer,* 206 U. S., 482, 492-493, in the following language:

> "But when the grant is *in præsenti*, and nothing remains to be done for the administration of the grant in the Land Department, and the conditions of the

> grant have been complied with and the grant fully earned, as in this case, notwithstanding the want of final certification and the issue of the patent, the railroad company had such title as would enable it to maintain ejectment against one wrongfully on the land, and title by prescription would run against it in favor of one in adverse possession under color of title. *Salt Co. vs. Tarpey,* 142 U. S., 241, and *Toltec Ranch Company vs. Cook,* 191 U. S., 532."

This ruling was expressly affirmed by the court in *Missouri Valley Land Company vs. Wiese, supra* (p. 245).

In other words, prescription will run against a railroad grant from the date of filing the map of definite location, even if no patent to the land may have issued from the United States.

The title which the company claimed when said patents were issued to it was that the lands patented were place lands under the granting act of 1864, and its then claim was that its right to the land attached upon the definite location of the road, on June 29, 1883, more than 29 years before the bringing of this action. Consequently, during any portion of that time subsequently to the purchase of the lands from the State and the State's deeds to the same, and the occupancy of the purchaser and his successor, beginning in 1892 and 1895, the company, under the decisions just cited, might have brought an action of ejectment against said purchaser and occupant, and hence, the adverse period of occupancy for ten years, as required by the Oregon law, had more than expired when the suit was brought, and no objection thereto can be effective on that point.

Company Could Not Defeat the Action by Conveying the Lands During Its Pendency.

Nor, under the doctrine of *lis pendens,* could the company defeat the action, during its pendency, by conveying away the lands involved therein. Ever since the decision of Chancellor Kent in the leading case of *Murray vs. Ballou,*

1 Johns, Ch. (N. Y.), 566, the law of this country has been settled that when a court acquires jurisdiction of the defendant and of the *res*, its jurisdiction cannot be ousted and the suit abated by a sale of the *res* by the defendant, and that any subsequent transferee takes with full notice of the suit and will be bound accordingly by any judgment of the court in the original suit.

In *Tilton vs. Cofield*, 93 U. S., 163, 168, the court said:

> "There is another objection to the case of the appellees, which must not be overlooked. They are not subsequent attaching creditors, nor creditors at all; they are purchasers *lite pendente*. The law is, that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset. *Inloe's Lessee vs. Harvey*, 11 Md., 524; *Salisbury vs. Benton*, 7 Lans., 352; *Harrington vs. Slade*, 19 Barb. S. C., 162; 1 Story's Eq., sect. 406. The appellees voluntarily took the position they occupy. They chose to buy a large amount of property, including that in controversy, from the fugitive debtor. This was done after the latter had been seized under the writ of attachment, and while the suit in which it was issued was still pending. They took the title subject to the contingencies of the amendments that were made, and of everything else, not *coram non judice*, the court might see fit to do in the case. The attachment might be discharged, or the judgment might be larger than was then anticipated. They took the chances and must abide the result. Having obtruded themselves upon the property attached, they insist that their purchase narrowed the rights of the plaintiffs and circumscribed the jurisdiction of the court. Such is not the law. After their purchase, the court, the parties, and the *res*, stood in all respects as they stood before; and the judgment, sale, and conveyance have exactly the same effect as if the appellees and the facts upon which they rely had no existence."

In *Hargrove vs. Cherokee Nation,* 129 Fed., 186, 190, the court said:

> "It is a general rule of law, and one which is absolutely essential to the effective prosecution of an action for the recovery of the possession of real property or to enforce a lien against the same, that one who acquires possession of property from a person against whom a suit is at the time pending for the possession thereof or to enforce a lien against the same takes it subject to the outcome of the pending action, and may be dispossessed precisely as the person from whom he acquired the possession might have been dispossessed had he retained the possession, whether such intruder is made a party to the suit and has his day in court or not. Any other rule would render suits for the recovery of real property ineffectual, as they might be defeated by repeated transfers of possession during the pendency of the action." Citing *Tilton vs. Cofield,* 93 U. S., 163, 168; *Whiteside vs. Haselton,* 110 U. S., 296, 301, and many other authorities.

Whether this doctrine of *lis pendens* can be invoked against the United States, to whom the company conveyed the lands after the suit was brought, need not, for present purposes, be considered. The point is, that the company *could not take advantage of such transfer* in order to defeat the suit, especially if, as intimated by the courts below, such transfer and conveyance was for that *very purpose.* It might very properly be held that the United States, under such conveyance, would take the property, if at all, subject to whatever judgment the court might render in the pending suit. This would be in accordance with the well-settled principle that "if the defendant aliens after the pendency of the writ, the judgment in the real action will overreach such alienation." *Murray vs. Ballou, supra.* Otherwise, a great avenue of fraud would be opened up, which the courts would refuse to sanction. And, under such principle, the court below was

correct in saying that there was nothing in the record to show that the conveyance of the lands to the United States had been accepted.

The Company's Pending Selections Invalid and Illegal.

The right of a railroad company acquired by selection is dependent upon the status of the selected tracts at date of selection.

Ryan vs. Railroad Company, 99 U. S., 382.

If at that time appropriated of record, such tracts are not subject to indemnity selection, and such selection should be rejected.

Missouri, Kansas and Texas Ry. Co. vs. Beal, 10 L. D., 504.

Hensley vs. Missouri, Kansas and Texas Ry. Co., 12 L. D., 19.

Bright vs. Northern Pacific R. R. Co., 6 L. D., 613.

Hastings & Dak. Ry. Co. vs. St. P., M. & M. Ry. Co., 13 L. D., 535.

Northern Pacific R. R. Co. vs. Loomis et al., 21 L. D., 395.

Southern Pacific R. R. Co. vs. McKinley, 22 L. D., 493.

Clancy et al. vs. Hastings & Dakota Ry. Co., 17 L. D., 592.

And a railroad company is not entitled to have its indemnity selection suspended to await the determination of the question whether the appropriation existent at date of selection is valid.

Northern Pacific R. R. Co. vs. Smith et al., 31 L. D., 151.

See also *United States vs. Southern Pacific R. R. Co.*, 223 U. S., 565, 570, in which the court, speaking through Mr. Justice Holmes, said:

> "An indemnity grant like the residuary clause in a will contemplates the uncertain, and looks to the future. What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may select when its right to indemnity is determined, depends on the state of the lands selected *at the moment of choice.*"

No doubt, having these principles in mind, it was held by Mr. Attorney General Wickersham, in *Northern Pacific Land-Grant—Indemnity Selections*, 29 Op. A. G., 498, rendered July 24, 1912, that the company—

> "May select as indemnity lands within the primary limits which, at the time the grant attached were 'reserved, sold, granted or otherwise appropriated,' *but which have since been relieved of that impediment and at the time of the selection are unoccupied or unappropriated lands.*" (Emphasis mine.)

The pending selections of the Northern Pacific Railroad Company of the lands in controversy were apparently made under authority of this ruling, but the record shows that at the date of tender of said selections the lands were included in a swamp-land selection of the State of Oregon, which remained of record in the Land Department and uncanceled. It also shows that the respondent and his grantors had been in possession of said selected tracts, which had been improved and cultivated for many years prior to and since said selections under claim and color of title derived through purchase from the State of Oregon under its said swamp-land claim. (Finding XI, *supra.*)

By reason of the adversary rights so initiated and gained the company's indemnity selections were invalid, both because of the pending swamp-land selection, and also because

of the fact that for many years the tracts had been adversely possessed, improved, and held by the respondent and his grantors under color of title, lands so held not being subject to selection. The tracts were obviously not "unappropriated" and "unoccupied" at date of selection, but the reverse, and so the selection did not conform to the requirements of the Attorney General's said opinion, and conferred no rights upon the selector.

These selections of the petitioner being invalid and illegal, as shown by the record and the authorities thereon, furnish all the more a good and sufficient reason why the petitioner is in no position to object to the jurisdiction of the Oregon courts in the instant case; and shows all the more conclusively that the title and claim of respondent is good as against said petitioner.

It must be remembered that the main object of this suit is to rid respondent's title and claim of whatever adverse claim the petitioner may have to the lands. What further, if anything, relator may be required to do and perform in order to get a full and complete title to the lands from the Government of the United States does not enter into the case at this time. It will be time enough to enter into that question when the petitioner's claim is out of the way. This suit is for the purpose of quieting title in the respondent, *as against the petitioner;* and there can be no possible doubt, under the authorities cited, that the Oregon courts had jurisdiction to consider and adjudicate that question.

Conclusion.

It results from the foregoing that the Oregon courts had complete jurisdiction of this suit; that, even though the paramount title to most of the lands be now in the United States, yet the jurisdiction of those courts extended to quieting the title in the respondent as against the petitioner in respect of all the land involved, and particularly to that tract which had been selected by petitioner and patented to it on May 25, 1914, to wit: the N. E. ¼ of S. W. ¼ of section 7, township 5 north, range 30 east, as to which the United States at the date of the decree had no title at all, having parted with its title by the issue of said patent; and that the decree below should be affirmed.

Respectfully submitted,

HARVEY M. FRIEND,
Counsel for the Respondent, E. W. McComas.

NORTHERN PACIFIC RAILWAY COMPANY ET AL. *v.* McCOMAS.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 172. Argued January 22, 1919.—Decided June 9, 1919.

Lands constituting parts of odd-numbered sections within the primary limits of the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365, but which, at the date when that company's line opposite them was definitely located, were claimed by the State of Oregon under the Swamp Land Acts, as evidenced by its selection list on file in the Land Department, were excepted by the Act of 1864 from the grant of place lands, whether the claim of the State was valid or not. Pp. 389, 391.

Patents erroneously issued for such lands, as place lands, gave to the railroad only the legal title, leaving the equitable title in the United States. *Id.*

Undisputed possession, cultivation and improvement of public lands, under a conveyance from a State based on an unapproved selection of the lands as swamp lands, can convey no title. P. 391.

Where public lands are claimed by an individual under the Swamp Land Act, and by a railroad under lieu selections, the courts cannot anticipate adjudication by the Land Department, beyond protecting or restoring a possession lawfully acquired. P. 392.

Whether public lands are such as to come within the Swamp Land Act and whether they have been so occupied and appropriated as not to be subject to lieu selection by a railroad, are questions for the decision of the Land Department. *Id.*

Approval of a lieu land selection is not a mere formal act, but involves an exercise of sound discretion by the Secretary of the Interior. P. 393.

The Secretary may reject such a selection and hold the title in the United States for the protection of a *bona fide* occupant, who under a misunderstanding of his rights has reclaimed and improved the land at large cost. *Id.* *Williams* v. *United States*, 138 U. S. 514, 524.

Where land, occupied and claimed by an individual under the swamp land law, was patented pending the suit to a railroad under a lieu

selection, *held* that the occupant could not avail of the statute of limitations or attack the patent collaterally. P. 393.

Where a railroad reconveys lands erroneously patented as place lands, and selects them as lieu lands, the fact that the land officers entertain the selections and pass one of them to patent establishes that the reconveyance was accepted by the United States. *Id.*

82 Oregon, 639, reversed.

THE case is stated in the opinion.

Mr. Charles Donnelly, with whom *Mr. Charles W. Bunn* was on the brief, for petitioners.

Mr. Harvey M. Friend for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to quiet title in the plaintiff to five small tracts of land in Umatilla County, Oregon, the right to such relief being predicated solely on adverse possession under color of title for ten years, the period prescribed in a local statute. The plaintiff obtained a judgment, which at first was affirmed by the Supreme Court of the State and then on a petition for rehearing was modified as to two of the tracts. 82 Oregon, 639. The case is here on writ of certiorari.

There was substantial testimony tending to show that McComas, the plaintiff, and his predecessors had been in undisputed possession of the lands for ten years when the suit was brought and that during that period they had been cultivating the lands and claiming the same under the deeds from the State hereinafter mentioned and had put improvements thereon costing more than ten thousand dollars. The other facts are set forth in a stipulation found in the record.

The lands are all parts of odd-numbered sections within

the primary or place limits of the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365. At the date of that act they were public lands of the United States and they continued to be such at the time the line of road opposite which they lie was definitely located, save as their status was affected by a pending claim of the State under the swamp-land grant made by the Acts of September 28, 1850, c. 84, 9 Stat. 519, and March 12, 1860, c. 5, 12 Stat. 3. This claim was shown by a swamp-land selection list filed in the Land Department November 23, 1872, and was still pending in that department in 1892 and 1895. In those years the State, without waiting for a determination of its claim by the department, executed deeds for the lands to persons who in turn executed deeds therefor to the plaintiff. As to three of the tracts the swamp-land claim was examined and rejected by the department some time before this suit was begun, and as to the other two it was still pending at that time.

The definite location of the line of road opposite which the lands lie was effected by a map filed in the Land Department and approved June 29, 1883. The grant to the railroad company was of all the odd-numbered sections of public land within designated limits on either side of the line of road as so located, with an express exception of such lands as at the time of definite location were reserved, sold, etc., or were not "free from preëmption, or other claims or rights." There was also an express exclusion of all mineral lands and a provision that "in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected" under the direction of the Secretary of the Interior. By reason of the pendency of the swamp-land claim at the time of the definite location all the tracts in question were excepted from the grant of lands in place, and this whether

the claim was well grounded or otherwise; that is to say, the fact that the claim was pending and undetermined prevented the lands from passing under the grant as place lands. *Whitney* v. *Taylor*, 158 U. S. 85, 92–94; *Northern Pacific R. R. Co.* v. *Sanders*, 166 U. S. 620, 630; *Northern Pacific R. R. Co.* v. *Musser-Sauntry Co.*, 168 U. S. 604, 609. But through some mistake in the Land Department three of the tracts were erroneously patented to the railroad company as place lands between 1906 and 1909. Without doubt the patents passed the legal title, but the United States was entitled to a reconveyance from the railroad company and in equity remained the true owner. *Germania Iron Co.* v. *United States*, 165 U. S. 379. The two tracts not patented as place lands were selected by the railroad company in 1908 and a succeeding year in lieu of other lands in place excluded from the grant by reason of being mineral. These selections were received by the local land office and were awaiting action by the Secretary of the Interior at the time of the trial.

This suit was brought September 25, 1912. Shortly thereafter the railroad company, recognizing that the patents theretofore issued to it for three of the tracts had been erroneously issued, reconveyed the title to the United States and subsequently selected those tracts in lieu of other tracts in place excluded from the grant by reason of being mineral. These selections were received by the local land office; one was approved by the Secretary of the Interior and passed to patent, and the other two were at the time of the trial pending before that officer.

The plaintiff made no effort by pleading or evidence to show that the swamp-land claim was well grounded or that he, his predecessors or the State, had in any way become entitled to receive the title from the United States.

With some hesitation the trial court concluded that the lands were not excepted from the grant of lands in

place by reason of the existence of the swamp-land claim at the date of the definite location, and therefore that on the definite location, by which the place limits were identified, the title passed to the railroad company, the grant being one *in præsenti* as respects place lands falling within its terms and not within its excepting or excluding clauses, and the provision for patents being intended only to give further assurance. *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241; *Toltec Ranch Co.* v. *Cook*, 191 U. S. 532. On that theory a decree was entered quieting the title in the plaintiff as to all the tracts.

But the court should have held that the swamp-land claim pending, as it was, at the date of the definite location prevented these lands from passing under the grant of lands in place. The decisions of this court before cited leave no room for doubt on this point. The cases of *Iowa Railroad Land Co.* v. *Blumer*, 206 U. S. 482, and *Missouri Valley Land Co.* v. *Wiese*, 208 U. S. 234, relied on by the plaintiff, are not apposite. The lands there in question were within the place limits and at the time of definite location were free from other claims; so they were not excepted from the grant, as here, but passed from the Government on the definite location. It follows that as to the three tracts erroneously patented as before shown the railroad company had no title, legal or equitable, prior to the issue of the patents. Up to that time the title was in the United States, and of course no prescriptive right was acquired against it under the local statute. Besides, the title received through those patents was turned back to the United States before the trial and this operated to restore the three tracts to their prior status as public lands. The title under those patents—and it was merely the naked legal title—did not remain in the railroad company for anything like the period named in the local statute, if that be material. As to the other two tracts the railroad company up to the time the suit was brought had nothing

more than pending lieu land selections which required the approval of the Secretary of the Interior to make them effective, *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496, 512, but as yet they had not received his approval.

The situation then at the time the case was heard in the trial court was this: The railroad company had neither the legal nor the equitable title to four of the tracts. Instead, the full title was in the United States and all existing claims to them arising under the land grants and other public land laws were pending in the Land Department, whose officers were specially charged by law with their examination and determination and with the disposal of the title accordingly. It is settled that in such a situation the courts may not take up the adjudication of the pending claims, but must await the decision of the land officers and the issue of patents in regular course. *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 592–594; *Brown* v. *Hitchcock*, 173 U. S. 473; *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301, 315; *Humbird* v. *Avery*, 195 U. S. 480, 502. There is, however, a related jurisdiction which the courts may exercise pending the final action of those officers; they may protect a possession lawfully acquired or restore one wrongfully interrupted, for that is a matter which is not confided to the Land Department and may be dealt with by the courts in the exercise of their general powers. *Gauthier* v. *Morrison*, 232 U. S. 452, 461.

Whether the tracts as to which the swamp-land claim is still pending were such as came within the terms of the swamp-land grant is a question of fact the decision of which is expressly committed to the Land Department; and this also is true of the question whether the tracts covered by the railroad company's lieu land selections were when the selections were tendered so occupied and appropriated as not properly to be subject to acquisition

in that way. The approval or disapproval by the Secretary of the Interior of such lieu selections is not merely a formal act. It involves an exercise of sound, but not arbitrary, discretion and makes it admissible for him, where a selection is proffered for land which a bona fide occupant, misinformed and misunderstanding his rights, has reclaimed and improved at large cost, to reject the selection and hold the title in the United States until, as this court has said, "within the limits of existing law or by special act of Congress," the occupant may be enabled to obtain title from the United States, *Williams* v. *United States*, 138 U. S. 514, 524.

As to the fifth tract the railroad company at the time of the trial held a patent issued pending the suit on a lieu land selection but recently initiated; so the prescriptive right asserted by the plaintiff could not possibly include that tract. If, as he asserts, the tract was so occupied or appropriated that it properly could not be selected and patented in lieu of land in place found to be mineral, that may afford an adequate basis for a suit by the United States to cancel the patent, *Diamond Coal & Coke Co.* v. *United States*, 233 U. S. 236, or afford a basis for holding the railroad company as a trustee of the title for him if, notwithstanding the silence of the present record on the subject, he was entitled to a patent for the tract, *Svor* v. *Morris*, 227 U. S. 524, 529–530; but it does not enable him to complain on behalf of the United States or to assail the patent collaterally. *Hoofnagle* v. *Anderson*, 7 Wheat. 212, 214–215; *Smelting Co.* v. *Kemp*, 104 U. S. 636, 647; *Bohall* v. *Dilla*, 114 U. S. 47, 51; *Sparks* v. *Pierce*, 115 U. S. 408, 412; *Fisher* v. *Rule*, 248 U. S. 314, 318.

The Supreme Court of the State in its final opinion came nearer the views here expressed than did the trial court, but it assumed that the reconveyance by the railroad company to the United States was not accepted by the latter and so was of no effect. In this the court was mis-

taken, for it affirmatively appears not only that the land officers after the reconveyance entertained the lieu selections of the same tracts, but also that they approved one of those selections and passed it to patent. Besides, the ultimate judgment entered by the court departs somewhat—possibly through a clerical inadvertence—from its final opinion.

The judgment must be reversed and the cause remanded for further proceedings not inconsistent with the views here expressed.

Judgment reversed.